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Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness

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Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness

LINZ AUDAIN*

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INTRODUCTION

In this Article, I argue that we, the adherents of law and economics,¹ have for too long ignored the analytical importance of culture² to our field of study. Perhaps the most poignant testimony to this disregard of culture³ has been the persistent absence of a systematic framework that incorporates culture into law and economic analysis. Such a framework, if posited, would have two goals. First, it would serve at an intimate level to extend an analytical hand and give a voice to those of us who find cultural bias to be concomitant with certain aspects of law and economic analysis.⁴ Second, at

1. The standard definition of law and economics is: the application of economic analysis principles to the study of law. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* at xix, 21 (4th ed. 1992). I have argued elsewhere, however, that "the substance of L&Ec [law and economics] primarily involves using legal objects as a translating medium—a means by which principles and assumptions of economic analysis are translated into principles and assumptions of L&Ec. These principles and assumptions are in turn used to explain, critique, and make predictions regarding legal objects." Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1038 (1992). For some useful citations to introductory books in the field, *see id.* n.80.

2. Law and economics has been in existence for at least the past 100 years, if not longer. *See* POSNER, *supra* note 1, at 21, 22 and references cited therein. What one will not find in either of the introductory works cited in note 1 is a discussion of a kind of law and economic analysis that depends on the culture of the analyst. Of course, this may not be so much the fault of law and economics as the fault of economic analysis itself. It is conceivable that some economists might perceive the recognition of the importance of culture to their analysis as a loss of positivism. *See infra* note 132 and accompanying text. The one major exception to this perception is a movement in economic analysis called "institutionalism." *See infra* note 356 and accompanying text. There are also some economists who have begun to argue that the culture of the analyst plays a role in the economic analysis that results. *See, e.g.*, TESSA MORRIS-SUZUKI, *A HISTORY OF JAPANESE ECONOMIC THOUGHT* 1-6 (1989).

A nascent movement within the philosophy of the social sciences seeks a "realist" social science that takes into account the fact that the strict logical positivist model, *see infra* note 130 and accompanying text, is not followed in *any* science, natural or social. This approach to the social sciences has been applied to psychology. One of the goals of this Article is to make inroads into a realist economic science. *See infra* text following note 15 for details of this Article's three other goals. For a discussion of realist philosophy of science, *see* PETER T. MANICAS, *A HISTORY & PHILOSOPHY OF THE SOCIAL SCIENCES* 241-65 (1987).

3. Let me emphasize that this Article is original in suggesting that law and economics scholars should have higher explicit analytical regard for culture. Critical Race Theorists have argued for some time that the academy should have higher analytical regard for culture in general. *See, e.g.*, Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988).

4. Demonstrating the nature of the cultural bias is, of course, one of the major objectives of the framework proposed here. Part II discusses how this might be done, and gives an illustration. There is little question but that the perception "out there" is that law and economics is an analytical framework that is compatible with the project of racial oppression. *See, e.g.*, Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CAL. L. REV. 597 (1991) (discussing the triumph of law and economic analysis in passing a "Racial Preference Licensing Act of 1996" which requires whites to pay for the right to discriminate). In the rest of that article and others, *e.g.*, Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988), Bell discusses the costs of discrimination from the perspective of one who has experienced it, an action that qualifies as Critical Cultural Law & Economics ("CCL&Ec"). It would be better CCL&Ec, however, for Bell to show the economic analytical difficulties with the preference statute. Notwithstanding, I should point out that it may be axiomatic to say that Derrick Bell has been an inspiration to virtually all of us who write in the interstice of race and the law. A brilliant recent piece that pays homage to Bell, and also qualifies as CCL&Ec, is Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). Harris' implicit discussion of the "white cartel" is taken up explicitly in Robert Cooter, *Market Affirmative Action*, 31

a disciplinary level the framework would increase the power of law and economics by expanding its descriptive accuracy, generalizability, and credibility.

The primary purpose of this Article is to posit just such a framework. I have chosen to call this framework "Critical Cultural Law and Economics" ("CCL&Ec"). There are two branches of CCL&Ec which correspond to the two goals of the framework identified above. In order to explore the difference between the two branches, one must begin with a provisional definition of a culture as a group of individuals who share certain common meanings.⁵ To illustrate: cows have a different meaning to Hindus than to non-Hindus.⁶ To say that the Hindu culture is different from another culture is to say not only that there might be different things and experiences between the two cultures, but also that similar things and experiences might have different meanings within each culture.

This Article extends the idea of culture to define a culture of deindividuation.⁷ I posit that deindividuation exists where society attributes psychological characteristics to someone on the basis of their immutable and apparent physical characteristics. Arguably, we are all members of this culture, which is represented by Figure 1, below. The culture of deindividuation encompasses the two subcultures of beneficial and detrimental deindividuation, which are distinguished by the nature of the beneficial or detrimental effect exerted upon the individual by deindividuation. Because sub-subcultures provide the most concrete illustrations of the culture,⁸ one can imagine sub-subcultures of race and gender within each of the subcultures of deindividuation.⁹

Although this intellectual scheme is pressed into service throughout this Article, it has a value independent of the Article. For example, it can be used to argue that one can be a member of the black sub-subculture without being a member of the African-American subculture, and vice versa.¹⁰

As another example, one of the major paradoxes of feminist thought¹¹ is parallel to a paradox in black thought because both spring from the same source: the paradox of deindividuation. The substance of the paradox of

SAN DIEGO L. REV. 133, 153-57 (1994), and Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. (forthcoming 1995) (manuscript at 21-43, on file with the *Indiana Law Journal*).

5. Culture is defined more fully in Part I.A.

6. Cf. WILLIAM A. HAVILAND, *CULTURAL ANTHROPOLOGY* 425 (1978).

7. See *infra* part I.C.

8. Cultural principles (e.g., deindividuation) become more concrete or contextualized as the cultural experience becomes more particular or unique. See *infra* text accompanying note 61.

9. The point here is that race or gender becomes the basis for deindividuation, be it beneficial (e.g., white and/or male) or detrimental (e.g., black and/or female). For a more in-depth discussion, see *infra* note 79 and accompanying text.

10. Throughout this Article, I use the black race for illustrative purposes. This is because I am more familiar with the literature that deals with blacks, and I am able to write from personal experience on some matters. By using the black race by way of example, it is not my intention to exclude other minority groups from the analytical implications of this Article.

11. For a discussion of this paradox, see *infra* notes 117-19 and accompanying text.

deindividuation is that those who have been detrimentally deindividuated must rely on their deindividuation in order to destroy it. The paradox inheres in the fact that in so relying, the deindividuated become unwitting participants in the perpetuation of the very deindividuation they seek to destroy. Using blacks once again as an example, the paradox of deindividuation becomes the paradox of blackness. The paradox is that we blacks must unite on the basis of our blackness, relying on a mythical construct of the "black race," treating one another as if we are alike, in order to oppose those who treat us that way. The proposition that we are not alike, that the construct of a black (or white or whatever) race is a completely socially constructed myth (the theory of non-race) is also discussed below.¹²

In this Article I discuss CCL&Ec against this backdrop about the nature of culture. Accordingly, in the first branch of Critical Cultural Law and Economics-Culture ("CCL&Ec-C"), culture informs law and economics. The first goal discussed above, the enfranchisement of different cultural perspectives (*i.e.*, different things and experiences or different meanings for the same things and experiences), is met with this branch. The critique here is chiefly a methodological one. In this Article I argue that law and economics can benefit from a little informed feeling and sensing ("phenomenology"), especially when data are vague and entrenched cultural and ideological biases exist.¹³

To illustrate, assume for the moment that white or male sub-subcultural perspectives dominate much of law and economics today. Such domination, by definition, will occasionally motivate a resistance, either intentional or unintentional, to perspectives that are inconsistent with the white or male sub-subcultural perspectives.

My reference to perspectives and not cultural membership in the prior paragraph is not accidental. That is, the overlap between being a member of a culture and possessing the perspective of that culture is a sizeable, but less than complete, overlap. For example, someone who is white or male could learn the perspective of those who are detrimentally deindividuated in our society. Membership in a sub-subculture of deindividuation is generally a sufficient but not necessary condition for having that perspective.¹⁴

12. The point here is that we are all members of the prison-house of the myth of race. Specifically, we have all been socially conditioned to see skin color as the relevant defining variable (*e.g.*, as opposed to ear lobe size). This is known in cultural anthropology as the theory of non-race. I take the analysis a step further and propose a radical theory of non-race which asserts that the very concept of race is itself racist since it invariably leads to the arbitrary categorization of individuals on the basis of immutable and apparent physical characteristics, and ultimately to psychological attribution on the basis of those characteristics. For a fuller discussion, see *infra* note 92 and accompanying text.

13. See *infra* note 134 and accompanying text.

14. Yet even here I hedge. For example, it is conceivable that there are individuals in America who have the physical characteristics that we define as "black" but do not experience racism. The rule in anthropology studies is that if more than 70% of the members of the subculture share a common experience, it is considered a subcultural experience. See, *e.g.*, Richard W. Brislin, *Applied Cross-Cultural Psychology: An Introduction*, in *APPLIED CROSS-CULTURAL PSYCHOLOGY* 9, 13 (Richard W. Brislin ed., 1990) (arguing that the determination of a subcultural value or experience is a statistical matter).

CCL&Ec-C provides a methodology, essentially the methodology of cultural anthropology, to promote the influence of alternative cultural perspectives on law and economic analysis. Anthropologists developed this methodology to better enable themselves to learn about other cultures. The methodology is particularly useful when law and economics is being used to analyze a problem that spans or is completely situated within a subculture which is not the analyst's own. A critique of the law and economic analysis is possible whenever the methodology has not been followed.

In the second branch of CCL&Ec—Critical Cultural Law and Economics—Law and Economics (“CCL&Ec-L”)—law and economics informs culture. Consistent with the second analytic goal discussed above, this version celebrates the universality of law and economics by affirming the power of economic analysis to provide insight into the legal or law-related problems of nondominant subcultures or, for that matter, entirely different cultures. Here, the methodology of CCL&Ec-L is essentially the methodology of law and economics (*e.g.*, abstraction and reduction). However, this methodology is applied to legal or law-related problems that are outside the domain of the dominant subculture. The objective is to have a legal story, to tell a cultural story about the legal story, and then to tell an economic story about the cultural story of the legal story.¹⁵

Hopefully, by now the reader understands that, in the analysis of any given cultural problem, law and economics simultaneously informs and becomes informed by culture. Put differently, CCL&Ec-C and CCL&Ec-L are simultaneously occurring phenomena that will be bifurcated only for purposes of this Article. Figure 4, below, reflects this process of simultaneous occurrence.

This Article, therefore, contains three embedded agendas. The first and primary agenda is that of announcing and defining a CCL&Ec framework. In fulfilling this first agenda, I will pursue a second agenda: to posit the existence of a culture of deindividualization. In fulfilling this second agenda, I will pursue a third: to make the case for a radical theory of non-race.

In view of this synopsis, the remainder of this Article will be organized as follows. Part I will be committed to culture: defining it and characterizing its structure and processes. Part II will discuss the methodology of CCL&Ec-C and apply that methodology to the debate on the law and economics of racial discrimination. Part III will discuss the methodology of CCL&Ec-L and apply that methodology to the Kennedy/Bell debate over the success of Critical Race Theory. The CCL&Ec framework having been presented, Part IV will show how the two branches of CCL&Ec relate to one another, comparing CCL&Ec

The converse of the preceding point is also true. That is, there are individuals who either do not have the physical characteristics that we identify as black or have never personally experienced racism, but are able to articulate with amazing clarity the perspective of those who have experienced racism. I have received the permission of my colleague Richard McAdams to cite him as an illustration of this phenomenon. Consider his assessment of hiring the “perfect black”: “For the bulk of society, it is sufficiently subtle merely to refrain from overt reliance on skin color alone. For example, a white employer may consider hiring a black worker if, but only if, she stands in stark contrast to all the stereotypes the employer holds of blacks.” McAdams, *supra* note 4, (manuscript at 92 n.254).

15. See *infra* note 249 and accompanying text.

to other critical movements in the law and to other efforts to show the relevance of culture to law and economics.

I. THE NATURE OF CULTURES AND SUBCULTURES

A. A Definition of Culture

In the not too distant past, the word "culture" was subject to many different definitions by cultural anthropologists.¹⁶ A casual survey of more recent literature, however, reveals that anthropologists have reached some consensus on a definition of culture.¹⁷ In this portion of the Article, the example that will be relied on is the idea of America and that idea's external representation (e.g., a piece of cloth with red and white bars, stars, etc.).

Culture can be defined as (a) "meanings" that (b) "people create, and . . . create people, as members of societies."¹⁸ Part (a) necessarily refers to the

16. Anthropology can be divided into two branches: physical and social (or cultural). Physical anthropology is concerned with humans as biological creatures; it draws on genetic and biological sciences to explain human evolution and variation. HAVILAND, *supra* note 6, at 8. Social anthropology, on the other hand, is more concerned with the study of humans as social animals. *Id.* at 8-9. It encompasses archeology, the study of cultural processes, cross-cultural analysis, and social and cultural systematics. Fred W. Voget, *The History of Cultural Anthropology*, in HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY 1, 1-3 (John J. Honigmann ed., 1973). A fine distinction has been made between social and cultural anthropology, which is associated with the restriction of the concept of culture to ideational or cognitive entities. Marvin Harris, *History and Ideological Significance of the Separation of Social and Cultural Anthropology*, in BEYOND THE MYTHS OF CULTURE 391, 391-405 (Eric B. Ross ed., 1980).

E.B. Tylor was the first anthropologist to define culture, which he represented as a "complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." EDWARD B. TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, RELIGION, LANGUAGE, ART AND CUSTOM* 1 (2d ed. 1974). This definition was given widespread currency by anthropologists of the time. See Voget, *supra*, at 2. But see Marshall Durbin, *Cognitive Anthropology*, in HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY, *supra*, at 447, 449-50 (discussing 10 different definitions of culture by cultural anthropologists). See generally MORRIS FREILICH, *Is Culture Still Relevant?*, in THE RELEVANCE OF CULTURE 1, 1-26 (Morris Freilich ed., 1989) (arguing that definitions of culture should reach beyond empty tags and labels to touch the humanity represented); DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 5-23 (1979) (sorting through various definitions of the term "culture"); Robert H. Winthrop, *Introduction: Culture and the Anthropological Tradition*, in CULTURE AND THE ANTHROPOLOGICAL TRADITION 1, 1-13 (Robert H. Winthrop ed., 1990) (noting that anthropology's multiple and conflicting definitions of "culture" are notorious).

17. See, e.g., ROBERT A. HINDE, *INDIVIDUALS, RELATIONSHIPS AND CULTURE* 4 n.2 (1987); AARON PODOLEFSKY & PETER J. BROWN, *APPLYING CULTURAL ANTHROPOLOGY* 2 (1991); JAMES P. SPRADLEY, *PARTICIPANT OBSERVATION* 8 (1980).

18. ULF HANNERZ, *CULTURAL COMPLEXITY: STUDIES IN THE SOCIAL ORGANIZATION OF MEANING* 3 (1992). The notion that culture is meaning can be found in the work of other recent authors. See, e.g., Jeffrey C. Alexander, *Analytic Debates: Understanding the Relative Autonomy of Culture*, in CULTURE & SOCIETY: CONTEMPORARY DEBATES 1-2 (Jeffrey C. Alexander & Steven Seidman eds., 1990); Friedrich H. Tenbruck, *The Cultural Foundations of Society*, in SOCIAL STRUCTURE AND CULTURE 20 (Hans Haferkamp ed., 1989). There is by no means complete unanimity on this definition of culture. See, e.g., J. ZVI NAMENWIRTH & ROBERT P. WEBER, *DYNAMICS OF CULTURE* 8, 16 (1987) (relying on the idea of culture as meaning, while simultaneously relying on the old definition of culture as a plan or design for living); Voget, *supra* note 16, at 3.

The definition of culture given in the text does not make clear the various approaches to culture that operate simultaneously within cultural anthropology. Although these approaches study different dimensions of culture, at times they overlap. It is useful to pause here to explicitly identify five of these approaches. Brief mention will also be made of three approaches to culture that are outside of cultural

meanings of things. Those things can be internal, such as "ideas . . . concepts, propositions, [and] values"¹⁹ that people carry around in their minds, as well as the ways in which their minds work.²⁰ The idea of America is an example. Things that have meaning can also be external things defined as "the different ways in which meaning is made accessible to the senses, made public."²¹ The American flag is an example. The process of imputing the meaning of an internal thing upon an external thing is called "externalization."²² All external things that are meaningful in effect represent the externalization of some internal meaning²³ (e.g., the cloth represents the idea of America).

Part (b) of the definition is partly reflected in the idea of the "cultural flow" of meaning.²⁴ There is a flow of meaning when people impute meaning upon external things or upon externalization.²⁵ This is one way in which people create meanings. The direction of the flow of meaning is *from* the idea *to* the thing. On the other hand, meanings can create people by interpreting and reinterpreting the meanings of external things. This process of interpretation and reinterpretation is also part of the cultural flow of meaning,²⁶ but this time the flow is from the meaning of the external thing to the meaning of the idea. For example, the burning of the American flag leads to an interpretation and reinterpretation of the meaning of the idea of "liberty" in America. Of course, part (b) should not be read to imply that there is equality in the cultural flow of meaning across all segments of the population.²⁷

anthropology. First, the cultural evolutionism approach, originated by Edward B. Tylor in 1871, holds that all cultures proceed from a primitive state to a more civilized state. See JOHN FRIEDL, *THE HUMAN PORTRAIT* 44-45 (1981). Cultural evolutionism has seen a recent revival in the work of Leslie A. White, who has devised less culturally-biased means of assessing the evolution of a culture, giving rise to the cultural ecological approach. *Id.* at 53-55. Second, configurationism, associated with Alfred L. Kroeber, holds that culture is "superorganic" (more than the sum of the individuals) and that it constrains the choices made by individuals in the culture. *Id.* at 48. Third, the culture and personality approach, associated with Margaret Mead, provides that because there are patterns of cultures, and because individuals in any given cultural pattern share similar childhood experiences, adults will consequently "share patterns of behaviors and personality." *Id.* at 51. Fourth, the functionalist approach, associated with Bronislaw Malinowski, stresses the importance of social institutions within a culture (e.g., basic needs (reproduction) are met through basic institutions (marriage)). Finally, structuralism, associated with Claude Lévi-Strauss, argues "that elements of all cultures are the product of a single mental process common to all humanity." *Id.* at 55. For a solid overview of the various theoretical postures imposed upon cultural anthropology, see generally *CULTURE AND SOCIETY: CONTEMPORARY DEBATES*, *supra*.

Regardless of the theoretical posture adopted, the method of cultural anthropology is unambiguously empirical or positivistic. The most popular positivistic posture is that of phenomenology. See *infra* note 134 and accompanying text.

There are approaches to the study of culture *outside* of cultural anthropology. These approaches can be seen as representing the views of acknowledged philosophers, see, e.g., Alexander, *supra*, at 21-22 (Marxist), acknowledged sociologists, see, e.g., *id.* at 15-17 (Weber), or critical theorists. See, e.g., ROBERT WUTHNOW ET AL., *CULTURAL ANALYSIS* 133, 137-40 (1984) (noting that Michel Foucault's analysis, characterized as "neo-structuralist," reflects the influence of Lévi-Strauss); cf. Alexander, *supra*, at 23 (classifying Foucault's work as "post-structuralist").

19. HANNERZ, *supra* note 18, at 7.

20. *Id.*

21. *Id.*

22. *Id.* at 4-7.

23. *Id.* at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 3-10.

Hopefully, the reader understands that cultures differ from one another not only because different cultures contain different internal/external things, but because different meanings are attached to internal/external things which are the same across cultures. This latter idea will be discussed further in subparts B and C, below. For purposes of this Article, however, the other aspects of culture suggested by the definition above (e.g., the nature of internal and external things, cultural flow, and the "social distribution"²⁸ of meaning), although important, will not be discussed in greater detail. Still other aspects of culture—its transmittal to the next generation,²⁹ its transmittal to other cultures,³⁰ its change over time,³¹ and its relativity³²—not explicitly suggested by the definition above, also will not be discussed here.

28. See generally *id.* There is a debate among anthropologists as to the primary locus of culture (i.e., whether it arises from nature or nurturing). For a good background discussion of the debate, see *id.* at 269 n.2. One author has persuasively suggested that culture is so useful and appropriate to the situation that it must have arisen externally. RICHARD A. BARRETT, *CULTURE & CONDUCT* 76-98 (1984).

29. See FRIEDL, *supra* note 18, at 90-93 (noting that the process of learning to be a member of a society, usually undergone by children learning the appropriate rules of interaction, is known as socialization).

30. See *id.* at 308-17 (noting that acculturation is the adaptive change which occurs when groups with different cultures come into continuous firsthand contact—it contrasts with revitalization movements, which respond to such contact by seeking to reestablish old cultural patterns and traditions).

31. As discussed above, the cultural evolutionism approach holds that cultures go through several stages. See *supra* note 18. The process of evolution may occur through innovation or diffusion. Innovation is the recombination of existing elements to create something entirely different, while diffusion is the borrowing of a cultural item. Although innovation is very important, diffusion tends to account for most new elements in a society. FRIEDL, *supra* note 18, at 307. The result of these processes will be greater differentiation and specialization of social institutions (i.e., an application of the functionalist approach to culture). See Jeffrey C. Alexander & Paul Colomy, *Preface to DIFFERENTIATION THEORY AND SOCIAL CHANGE* at xiii (Jeffrey C. Alexander & Paul Colomy eds., 1990).

32. Professor Friedl expresses relevant points with an eloquence and clarity which merit quoting: Ethnocentrism is the belief that one's own patterns of behavior are the best: the most natural, beautiful, right or important. Therefore, other people, to the extent that they live differently, live by standards that are inhuman, irrational, unnatural or wrong.

...
... Ethnocentrism is not something we can will away—it constantly creeps back. ...

...
In his opposition to the ethnocentrism of nineteenth-century anthropology, [Franz] Boas arrived at a position that is best described as cultural relativism. By this he meant that the anthropologist must remain neutral when describing and comparing other cultures, and make no judgments about the merits of one culture over another. ...

Cultural relativism was a logical outcome of Boas' work, in which he showed that the history of each group was distinct. Thus, whatever a culture is like today, it became that way as a result of its own development, and therefore cannot be ranked against another culture with a different history. Each culture has changed over time, some more than others in certain areas, and some in response to pressures that others did not face. The point for Boas was that, because each culture has its own history, cultures cannot be compared on a scale of excellence in which the ranks are set according to the standards of one particular group. There could not be a model toward which all change had been directed in the past, for change had proceeded in many different directions at the same time.

...
Every culture proposes solutions to the problems people face. . . . If a solution seems impractical to us because we know a different solution, we must not overlook the fact that within its cultural context it may be very practical indeed.

FRIEDL, *supra* note 18, at 98-105.

For more information on the work of Franz Boas, see generally Arnold Krupat, *Irony in Anthropology: The Work of Franz Boas*, in *MODERNIST ANTHROPOLOGY* 133 (Marc Manganaro ed., 1990).

B. The Nature of Subcultures

1. Definition of Subculture

A subculture can be said to involve "a baseline symmetry of perspectives among participants, cumulatively stabilized and amplified by the back-and-forth flow of meaning among them."³³ That is, the sameness of perspectives generates a sameness of the meaning of internal (e.g., ideas) and external things between and among members of the subculture. Clearly, this sameness or "clusters of meaning,"³⁴ these "shared understandings,"³⁵ rely significantly on the idea of "perspectives."

Accordingly, perspective is "the device which organizes the attention and interpretation which an individual gives to externally carried meaning, as well as his production of such meaning, whether deliberate or spontaneous."³⁶ Similar perspectives in turn are held by individuals who possess similar "role repertoires."³⁷ Any given individual's role repertoire reflects the various roles played by individuals in a complex society. These roles relate to the "division of labor,"³⁸ "household activities and kinship,"³⁹ and personal characteristics—"[g]ender, age, or ethnicity."⁴⁰ In sum, subcultures are in essence shared meanings that depend on similar perspectives which in turn depend on similar role repertoires. This compound definition necessitates the following four observations.

The first is that although it is true that cultures are groups sharing common meanings,⁴¹ to the extent that those meanings depend on the various perspectives within the culture, it is more accurate to say that a culture represents a "network of perspectives."⁴² Diversity within a culture, therefore, springs from the "perspectivation of meaning"⁴³ within that culture. Use of the word "network" is critical here. A culture is not simply a collection of subcultures—it is a "complex interlinkage" of subcultures.⁴⁴ The existence of a "dominant subculture," as defined below,⁴⁵ is critical to the existence of this interlinkage of subcultures.

The second observation is that the unit of analysis of the subculture is not the individual, but the relationship among individuals. This is reflected in the

33. HANNERZ, *supra* note 18, at 70-71.

34. *Id.* at 74.

35. *Id.*

36. *Id.* at 65.

37. *Id.* at 66.

38. *Id.*

39. *Id.*

40. *Id.* Indeed, extensive attention has been given to the concept that culture can be a significant factor in the molding of individual personality. See, e.g., VICTOR BARNOUW, *CULTURE AND PERSONALITY* (1979).

41. See *supra* part I.A.

42. HANNERZ, *supra* note 18, at 68.

43. *Id.*

44. *Id.*

45. See *infra* text accompanying notes 62-63.

idea of roles discussed above.⁴⁶ Because individuals have various roles, or are involved in various social relationships, it follows that a given individual need not be captive to one subculture. Indeed, "[p]eople can be involved with one subculture, rather, through one role, or a constellation of some of their roles, and with other subcultures through other roles in their repertoires."⁴⁷

The third observation is that at least three conditions must be met for the ideal development and continued existence of subcultures. First, "[p]eople should . . . be in similar circumstances, in order to generate similar perspectives."⁴⁸ Second, "[t]hey should . . . be in effective interaction,"⁴⁹ and third, they should be "isolated from others."⁵⁰ These last two conditions ensure that the flow of meaning among the members of the subculture will be a large percentage of the total cultural flow of meaning that reaches them.⁵¹

Fourth, subcultures can be defined according to distinctive meanings. However, subcultures can also be defined according to distinctive forms of externalization (*e.g.*, academic communities).⁵²

2. Dimensions of Variation Among Subcultures

Having defined subcultures, it may be instructive to consider now the dimensions along which subcultures can vary. Although there are doubtless a number of such dimensions, I have culled four: (a) size, (b) strength, (c) degree of nesting, and (d) degree of dominance. Each dimension of a subculture will be discussed in turn below.

Size is one dimension along which subcultures can vary. Cultures and subcultures can have "[a]s few as two, or as many as millions"⁵³ of members. Subcultures are carried in social relationships which can exist between two or among millions of people. Intermediate between the subculture with two people and that with millions of people stands the "microculture."⁵⁴ The microculture contains "shared meanings directly tied to specific, likewise shared, experiences of people, settings, and events."⁵⁵ Microcultures seldom number beyond "a few dozen people, or a hundred."⁵⁶

Strength is another dimension along which subcultures can vary. It can be understood if one notes that, although a subculture must be carried on a social relationship, not all social relationships carry subcultures. For example, a

46. See *supra* text accompanying notes 37-40.

47. HANNERZ, *supra* note 18, at 72. Some anthropologists have gone so far as to assert that individuals who do not partake of a variety of cultures are abnormal. Ward H. Goodenough, *Multiculturalism as the Normal Human Experience*, in *APPLIED ANTHROPOLOGY IN AMERICA* 89-96 (Elizabeth M. Eddy & William L. Partridge eds., 1987).

48. HANNERZ, *supra* note 18, at 72.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 98-99.

53. *Id.* at 68; see also *id.* at 77.

54. *Id.* at 77.

55. *Id.*

56. *Id.*

fleeting encounter with a stranger is a social relationship with little, if any, shared understanding.⁵⁷ Since social relationships do not always carry or reflect subcultures, it follows that the strength of a subculture is measured by the number of individual social relationships that happen to reflect the subculture. Stated differently, the strength of a subculture varies in direct proportion to the number of roles and the degree of importance of roles (from an individual's role repertoire) that a subculture draws upon and integrates.⁵⁸

The third dimension of variation among subcultures is the extent to which there are other subcultures (*e.g.*, sub-subcultures⁵⁹) nested or embedded within them. For example, "[a]n ethnic subculture may splinter on the basis of class, and then again on the basis of age and gender."⁶⁰ The more embedded a sub-subculture is, the more contextualized the meaning shared by the members of that sub-subculture will become. The end result is that all the members of the subculture might agree on "decontextualized understandings, of an 'in principle' variety," (*e.g.*, racism).⁶¹ The members of the sub-subculture, however, might have a shared understanding not available to the rest of the subculture (*e.g.*, racism against women).

The fourth dimension along which subcultures may vary is their degree of dominance or "mainstream-ness." "[M]ainstream culture' can be seen as a subculture in command of a more widely reaching cultural apparatus."⁶² The cultural apparatus is "all the organizations and milieus in which artistic, intellectual, and scientific work goes on, and of the means by which such work is made available to circles, publics, and masses."⁶³ In America, the white male sub-subculture is the culture that controls the cultural apparatus.

Note three points about the cultural apparatus. First, the flow of meanings emanating from the cultural apparatus is not always automatically channeled into other subcultures.⁶⁴ Second, even when the flow of meaning is channeled into other subcultures, there may be an adaptation of the meanings intended by the dominant subculture. For some subcultures, there will be less adaption. "Their internal shared perspectives get additional support."⁶⁵ For other subcultures there will be more adaption, because the "messages [from the cultural apparatus] are affronts, or at least reminders that the bearers of the subculture are not members of that community on whose baseline assumptions these messages build."⁶⁶ Part of the adaption by the affronted subculture may involve the development of its own cultural apparatus (*e.g.*,

57. *Id.* at 74.

58. *Id.* at 72-73; see also JOHN M. YINGER, COUNTERCULTURES (1982) (stating that countercultures are subcultures which interpret meanings in a manner antithetical to the dominant culture). For an interesting look at the changing nature of roles in modern society, see JERALD HAGE & CHARLES H. POWERS, POST-INDUSTRIAL LIVES (1992).

59. HANNERZ, *supra* note 18, at 75.

60. *Id.*

61. *Id.*

62. *Id.* at 92.

63. *Id.* at 82 (quoting C. Wright Mills).

64. *Id.* at 90.

65. *Id.* at 91.

66. *Id.*

Black Entertainment Television). The third point is that because of the absence of feedback, the messages from the cultural apparatus may persist with their "own burden of inefficiency."⁶⁷

3. Relations Among Subcultures

As previously discussed, any given individual can embody several subcultures.⁶⁸ The arrangement of these subcultures within any given individual can also vary. For example, the subcultures can "crisscross . . . [or] arrange themselves like Chinese boxes,"⁶⁹ raising the question: Which subculture predominates within the individual at any given moment? It seems reasonable to assume that the strongest will predominate. As the reader will recall, the more a subculture spans an individual's role repertoire, the stronger the subculture.⁷⁰ Yet even when one subculture predominates, subcultures clearly will have poorly defined boundaries, overlap, and remain uncompartmentalized within the individual.⁷¹

The relations of subcultures residing within the individual can be contrasted to the relations of subcultures carried by social relationships. Individuals exert no special effort to segregate and compartmentalize the subcultures within them. In this context, the fuzzy boundaries of subcultures present no special dilemma. Precisely the opposite is true, however, of subcultures carried by social relationships. Indistinct subcultural boundaries are an anathema to the integrity of any given subculture. True, the response of any given subculture to subcultural difference will vary—show "indifference, or exaggerate it, or play it down."⁷² In any event, this response will represent "a way of sharpening reflexively the contours of one's own [subculture]."⁷³

C. The Culture of Deindividualization

I wish to close this introductory discussion of culture by positing the existence of something that can be called a "culture of deindividualization." This culture, in its most decontextualized form, attributes psychological characteristics to someone on the basis of his or her immutable and apparent

67. *Id.* at 93.

68. *See supra* text accompanying note 47.

69. HANNERZ, *supra* note 18, at 78.

70. *See supra* text accompanying note 58.

71. HANNERZ, *supra* note 18, at 73.

72. *Id.* at 78.

73. *Id.* at 79.

physical characteristics.⁷⁴ It "deindividualizes" by removing the element of choice in defining one's own individuality.

To characterize deindividualization as a culture is to argue that deindividualization reflects all of the aspects of a culture. For example, culture is transmitted from generation to generation, it is collective, etc.⁷⁵ In contrast, stereotyping⁷⁶ is an activity that occurs (nonexclusively) within this culture. Individuals can be stereotyped according to their voluntary membership in a group—for example, religion. In this case, the individual has chosen to define his or her individuality by membership in the group, and so deindividualization is less of an issue.⁷⁷

In each of the following four points regarding the culture of deindividualization, "deindividualization" will refer to the attribution of psychological characteristics on the basis of immutable and apparent physical characteristics.

1. Beneficial vs. Detrimental Deindividualization

Most of the members of Western society, much like the "culture of poverty" which spans the personal characteristics of its members, are members of the culture of deindividualization.⁷⁸ At the level of subcultural contextualization,

74. As far as I know, identification and definition of this culture is a unique contribution of this Article. Of course, social scientists have discussed "[t]he distinction between class and birth-ascribed stratification." See Gerald D. Berreman, *Race, Caste, and Other Invidious Distinctions in Social Stratification*, in *ANTHROPOLOGY FOR THE NINETIES—INTRODUCTORY READINGS* 486 (Johnnetta B. Cole ed., 1988). My characterization of the problem as one of a culture of deindividualization suggests a reason *why* the distinction is invidious and why it is transmitted from generation to generation, taught to other cultures, etc.

75. For a discussion of the transmittal of a culture, see *supra* notes 29-30 and accompanying text.

76. "A stereotype is an image in which a single set of characteristics, favorable or unfavorable, is attributed to an entire group." BETH B. HESS ET AL., *SOCIOLOGY* 231 (2d ed. 1985).

77. There are two underlying issues in this statement. First, it appears that I have painted a black and white picture of a subject which has some gray areas. Indeed, the cultural malleability of the human organism seems to be a foundational and unquestioned assumption in cultural anthropology. See, e.g., HAVILAND, *supra* note 6, at 17 (stating that culture is learned or chosen at an early age). Within psychology, this is known as the strictly behaviorist position. See GEORGE H. MEAD, *MIND, SELF & SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (Charles W. Morris ed., 1934); JOHN B. WATSON, *PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST* (1929). Sociobiology has risen up as a field that challenges the behaviorist project by showing how at least some of our social behaviors are biologically determined. See generally ALEXANDER ROSENBERG, *SOCIOBIOLOGY AND THE PREEMPTION OF SOCIAL SCIENCE* (1980). On a more practical and common level, one could debate the question of how much "effective choice" some individuals have (e.g., homosexuals, members of strongly fundamentalist sects or religions).

Second, when I use the term "immutable" physical characteristics, I am clearly assuming a characteristic that can be changed only at high economic and psychic cost. Although I am open to a consideration of all views on these two issues, I avoid a substantial discussion of them because the model suffers no loss of generality as a result of this avoidance.

78. A succinct statement of the culture of poverty is that "[s]hared poverty generates cultures of poverty. . . . People in a poor neighborhood . . . have a web of contextualized understandings among themselves, of the 'I know that you know that I know' type, with which outsiders would mostly be unfamiliar." HANNERZ, *supra* note 18, at 76. Hannerz also explains that an outsider to the culture would have difficulty understanding the rationale behind using certain criteria, such as economic status or physical attributes, to differentiate classes of people. *Id.* For a fuller discussion of the culture of poverty, see generally RICHARD BASHAM, *THE CROSS-CULTURAL STUDY OF COMPLEX SOCIETIES* 165-69 (1978); EDWIN EAMES & JUDITH G. GOODE, *ANTHROPOLOGY OF THE CITY: AN INTRODUCTION TO URBAN ANTHROPOLOGY* 304-23 (1977); Edwin Eames & Judith G. Goode, *The Culture of Poverty: A Misapplication of Anthropology to Contemporary Issues*, in *URBAN LIFE: READINGS IN URBAN*

one can distinguish at least two kinds of deindividuation corresponding to two kinds of subcultures: beneficial and detrimental deindividuation, each defined by the *net effect*⁷⁹ of the deindividuation upon the individual.⁸⁰ In order to further clarify the nature of these two subcultures, I will use as examples the sub-subcultures of race and gender, each of which is present in the other subculture, as illustrated in Figure 1. Three observations follow.

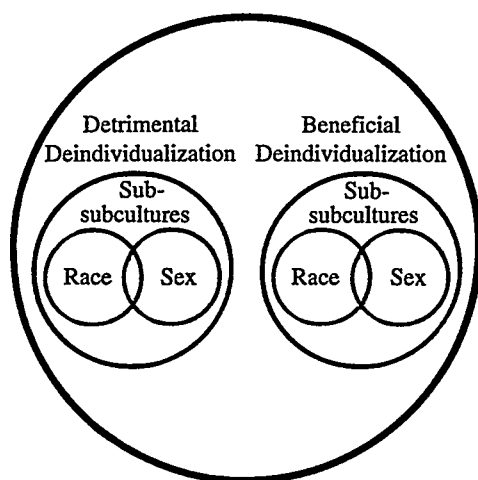


Figure 1

ANTHROPOLOGY 320 (George Gmelch & Walter P. Zenner eds., 1988); Oscar Lewis, *The Culture of Poverty, in URBAN LIFE: READINGS IN URBAN ANTHROPOLOGY*, *supra*, at 310.

79. This is a critical distinction. It seems simplistic to suggest that whiteness or maleness is a deindividuation that is consistently beneficial. The negative deindividuation associated with these qualities (e.g., all whites are racist or all males are sexist) is outweighed, however, by the positive deindividuation associated with these qualities. The converse observation applies to blackness and femaleness which are qualities that are net negative deindividuations.

80. The point is that in a world in which deindividuation exists, the right to not be prejudged—to be a blank slate—should be valued and cherished. Many whites, males in particular, take this right for granted, assuming it is their due; this assumption is particularly evident in their interactions with each other. However, imagine going through life knowing that others are burdened with preconceptions about your identity, beliefs, capabilities, and so forth. In a world of endemic racism, many blacks have internalized this hatred towards blackness. See David Rosenfield & Walter G. Stephan, *Intergroup Relations Among Children*, in *DEVELOPMENTAL SOCIAL PSYCHOLOGY* 271-97 (Sharon S. Brehm et al. eds., 1981) (noting that studies show that black children exposed to racism exhibit a preference for a Caucasian doll over a black doll). The right to appear as an individual who is not prejudged is something more likely to be attributed to whiteness or maleness.

Another common beneficial deindividuation is the presumption, absent overwhelming evidence to the contrary, that an individual is free of negative qualities. This leads to the dismissal of less-than-overwhelming evidence with the common refrain "he seems like such a nice boy." Interpretation: he is a white male like my son or grandson or nephew, and they do not do those things, so the evidence must be false.

It would appear that the most popular beneficial deindividuation is the attribution of positive characteristics (e.g., authority, intelligence, articulateness, etc.) to the individual.

First, because deindividualization relies on immutable and apparent physical characteristics, membership within any given cultural group (culture, subculture, sub-subculture) is involuntary or beyond the individual's control. The implication of this is apparent if one consults the psychological "locus of control" literature, which demonstrates that individuals attribute positive results to themselves personally and negative results to factors which are beyond their control.⁸¹ Accordingly, members of the beneficially deindividualized culture (e.g., whites, males) will have the perspective that none or very few of their positive life results come from their group membership. Likewise, members of the detrimentally deindividualized culture (e.g., nonwhites, females) will have the perspective that most, if not all, of their negative life results are attributable to their group membership.

Second, a critical defining element of a subculture is the degree to which group members' perspectives on meaning are similar (e.g., "we have the same perspective on what this means"). Perspectives and understandings can differ depending on the degree of contextualization of meaning. Accordingly, the fact that individuals are members in the same race sub-subculture or gender sub-subculture provides no guarantee that they will have the same perspective on the meaning of detrimental deindividualization. Indeed, they may not even conceive of themselves as being members of the same subculture. One would therefore expect to find black men who are sexist,⁸² and white women who are racist.⁸³

Similarly, one would expect to find women who are sexist toward men and other women; and blacks who are racist toward whites and other blacks.⁸⁴

81. J. RICHARD EISER, SOCIAL PSYCHOLOGY 198-201 (1986); see also Carol S. Dweck & Therese E. Goetz, *Attributions and Learned Helplessness*, in 2 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 157, 172-75 (John H. Harvey et al. eds., 1978); John H. Harvey, *Attribution of Freedom*, in 1 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 73, 83-84 (John H. Harvey et al. eds., 1976).

82. See, e.g., Diane K. Lewis, *A Response to Inequality: Black Women, Racism and Sexism*, in BLACK WOMEN IN AMERICA: SOCIAL SCIENCE PERSPECTIVES 43 n.6 (Micheline R. Malson et al. eds., 1990) ("The black man grapples to achieve social justice and parity with the white male—essentially to attain white male power, privilege and status—while shoving black women to the back of the bus."). See generally ROSALYN TERBORGH-PENN, *Black Male Perspectives on the 19th Century Black Woman*, in THE AFRICAN-AMERICAN WOMAN: STRUGGLES AND IMAGES 28 (1978).

83. See KATHLEEN M. BLEE, *WOMEN OF THE KLAN: RACISM AND GENDER IN THE 1920S* (1991).

84. The paradox of deindividualization that arises where one is using sexism to fight sexism or racism to fight racism is discussed below. See *infra* notes 116-23 and accompanying text. The paradox arises from the perceived necessity for the sexism or racism. In contrast, the reference here is to the kind of sexism and racism that is not directed toward any particular purpose.

The literature on sex and race discrimination uses the term "essentialism" to characterize the situation when women or racial minorities make assumptions about the commonality of the other gender or other races. As demonstrated by the citations following, there have been a number of remarkable analyses of the problem of essentialism. The point is that a culture of deindividualization allows us to see that we are dealing with a difference of *degree* of sexism or racism, not a difference in *kind*. For example, using a different word, "essentialism," suggests that one crosses a line into a different kind of sexism or racism. In reality, most, but not all, of the sexism or racism practiced by males and whites is more pernicious than that practiced by women and racial minorities.

For a discussion of racial essentialism, see Robin D. Barnes, *Race Consciousness*, 103 HARV. L. REV. 1864 (1990); Claudette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Jerome M. Culp, Jr., *Voice, Perspective, Truth and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61 (1992). For discussions of gender essentialism,

This is because the decontextualized *principle* of detrimental deindividuation takes on a different meaning for one who is a member of a sub-subculture as opposed to simply a member of the culture of deindividuation (e.g., "when *he* does it, it is sexism, when *I* do the same thing, it isn't sexism").⁸⁵ One would expect to find an altogether unique perspective among individuals who represent an overlap of two sub-subcultures (e.g., black women).⁸⁶

Third, there are two reasons why the detrimental deindividuation subculture is stronger than the beneficial deindividuation subculture.⁸⁷ First, assuming two otherwise similar individuals, one might expect more bad things to happen more often to the detrimentally deindividuated individual, because that is what it means to be detrimentally deindividuated. Those bad things would span more of the roles in that individual's repertoire, thereby causing the detrimental deindividuation subculture to be stronger. Second, the perception that detrimental deindividuation causes bad things⁸⁸ might lead to a self-fulfilling prophecy, causing even more bad things to happen in an individual's life.⁸⁹

see Regina Austin, *Black Women, Sisterhood and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Robin D. Barnes, *Black Women Law Professors and Critical Self-Consciousness*, 6 BERKELEY WOMEN'S L.J. 57 (1990-1991); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992).

85. See the discussion *supra* at text accompanying note 61 for the argument that principles that are differently contextualized will have different meanings.

86. Crenshaw's "intersectionality theory" argues that race and sex discrimination, when experienced simultaneously, amount to more than the sum of the two individual experiences. This seems to be in accord with the theory presented here. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

87. For the definition of the strength of a subculture, see *supra* text accompanying notes 57-58.

88. This is the "locus of control phenomenon," as discussed *supra* at text accompanying note 81.

89. One example of stereotypes creating self-fulfilling prophecies is illustrated in the Allport and Postman experiment, conducted in the 1940's. GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* 111 (1947) (relating the experiment and describing it as an example of the impact of cultural expectations on perception). Their experiment involved showing a sketch of a subway train in which a black man and a white man are standing together talking. The black man is dressed in business clothes; the white man is wearing a T-shirt and carrying a straight razor. The first subject in each of over forty groups of subjects was asked to examine the picture briefly and describe it to a second subject, who described it to a third, as in the children's game "telephone." After description through a chain of six or seven subjects, the drawing was more often than not described as one in which a black man was holding a razor. Often, he was using it to threaten the white man. *Id.*; see also ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 38-39 (1979) ("In over half of the experiments . . . the [black] man . . . is said to hold the razor . . . [sometimes] reported as brandishing it . . . or as threatening the white man with it."). See generally Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCH. 109, 112-15 (1974). On the role of the expectations of others in self-fulfilling prophecies, see LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 154-58, 227-28 (1991); Mark Snyder, *When Belief Creates Reality*, in 18 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 247 (Leonard Berkowitz ed., 1984).

2. Original Deindividualization & the Role of the Cultural Apparatus

I theorize that at the original moment of arbitrarily defining which immutable and apparent physical characteristics are due beneficial deindividualization, control of the cultural apparatus⁹⁰ is contested. The defining moment makes it possible for an arbitrarily defined group to arbitrarily define its groupness. Delineation of the boundaries of the newly defined subculture makes it possible for this new subculture to seize control of the cultural apparatus. With this control of the flow of meaning, it becomes possible to reinforce groupness and the meaning of the immutable and apparent physical characteristics shared by the members of the group (*i.e.*, *these* are the characteristics that are due beneficial deindividualization).

The history of race in the Western World⁹¹ provides a good illustration of this theory.⁹² In a pre-race world, individuals were divided according to their cultural affiliation. Indeed, as late as 1735, Linnaeus proposed that there were four categories of human beings: "American, European, Asiatic and African."⁹³ For example, in this pre-race world, "white" and "black" Egyptians were simply Egyptians.⁹⁴ In this scenario, making arbitrary distinctions

90. For a definition of the cultural apparatus, see *supra* text accompanying note 63.

91. For useful histories of the idea of race, see THE CONCEPT OF RACE (Ashley Montagu ed., 1964); MICHAEL BANTON & JONATHAN HARWOOD, THE RACE CONCEPT (1975); ASHLEY MONTAGU, THE IDEA OF RACE (1965) [hereinafter MONTAGU, IDEA OF RACE]; NANCY STEPAN, THE IDEA OF RACE IN SCIENCE (1982).

92. Although Banton and Harwood do not rely on the idea of control of the cultural apparatus through race, the point is present throughout their work. See, e.g., BANTON & HARWOOD, *supra* note 91, at 8 ("[R]ace was a kind of classification invented by Europeans first to press the political claims of groups within European countries; then to represent the relations between these countries; only later when the potentialities of this way of labelling people had been extended and biological theories integrated with social ones, was it imposed upon the rest of the world.").

93. MICHAEL D. OLIEN, THE HUMAN MYTH, AN INTRODUCTION TO ANTHROPOLOGY 106 (1978). See generally TORE FRÅNGSMYR ET AL., LINNAEUS, THE MAN AND HIS WORK (1983); FROM LINNAEUS TO DARWIN: COMMENTARIES ON THE HISTORY OF BIOLOGY AND GEOLOGY: PAPERS FROM THE 5TH EASTER MEETING OF THE SOCIETY FOR NATURAL HISTORY (Alwyne C. Wheeler & J.H. Price eds., 1983); DEREK GJERTSEN, THE CLASSICS OF SCIENCE: A STUDY OF TWELVE ENDURING SCIENTIFIC WORKS (1984).

94. Cf. BANTON & HARWOOD, *supra* note 91, at 14. Banton and Harwood do not use this specific example. My point here is that through our race eyes, we might classify some Egyptians as white Egyptians and some as black Egyptians. In a pre-race world, such a distinction would not have been plausible because although external physical differences were observed, they were merely geographic indicators, not indications of innate characteristics. For example, Banton and Harwood observe: "Though classical antiquity knew no prejudice of the kind seen in the nineteenth and twentieth centuries, the seeds were already there when Europeans first came into contact with Africans." *Id.* at 24. Despite the presence of these seeds (e.g., the Christian symbolic equation of white with purity and black with evil) there is evidence that the "races" interacted without racism in, for example, 16th-century intermarriage in Europe. *Id.* at 23. The real separations in a pre-race world were along religious lines. *Id.* at 7. This does not present as great a deindividualization problem, however, since one can claim to be a member of any religion, but not of any race.

For a useful discussion of the history of race and its relevance to the law, see D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993). In contrast to the anthropological approach taken in this Article, Jones takes a semiotic approach to the issue of race, demonstrating how the various narratives of race constrain those of us within the law. See *id.*

between these two groups of Egyptians on the basis of the pigment of their skin would have seemed ludicrous.⁹⁵

The origin of the word "race" is unclear.⁹⁶ In 1775, however, Johann F. Blumenbach proposed the first scientific taxonomy of human beings that relied on pigment of skin ("white, yellow, black, red, and brown") as the primary basis for distinguishing among human beings.⁹⁷ Of course, the beneficial deindividualization was concomitant to this taxonomy since it allowed Blumenbach's fellow Germans to define themselves as the "master race."⁹⁸ It may not be too farfetched to view this century's two world wars as efforts by this arbitrarily defined group of humans, blinded by the folly of their rhetoric, to seize the worldwide cultural apparatus and thereby control the worldwide flow of meaning.⁹⁹ Furthermore, Blumenbach's theory, and others similar to it, provided a justification for America's unique brand of slavery.¹⁰⁰

Blumenbach deserves special blame for perverting, perhaps unwittingly, the methods of science to serve narrow nationalistic aims.¹⁰¹ "Unfortunately the

95. Although distinctions between people were made at this time, they were seldom based on immutable and physically apparent racial characteristics. MONTAGU, *IDEA OF RACE*, *supra* note 91, at 13.

96. Michael Olien suggests that Georges Louis Leclerc, conte de Buffon, was the first to use "race" to describe human beings. OLIEN, *supra* note 93, at 106. Banton and Harwood suggest that the word first appeared (in English) in 1508 and was used to describe different categories of people in 1684 by Francois Bernier. BANTON & HARWOOD, *supra* note 91, at 13. See generally STEPAN, *supra* note 91 (discussing the history of the concept of race in science); *THE INVENTION OF ETHNICITY* (Werner Sollors ed., 1989) (compiling various works by various authors concerning ethnicity and culture).

97. OLIEN, *supra* note 93, at 106-07 (discussing Blumenbach's classification).

98. Banton and Harwood observe:

The most destructive and terrible phase in the career of the race concept came in Hitler's Germany. An Englishman turned German citizen called Houston Stewart Chamberlain had published in German in 1897 two volumes entitled *The Foundations of the Nineteenth Century*. Their theme was that race is made by man, by the will of the people. "Even if it were proved that in the past there never was an Aryan race, we want there to be one in the future" and the Germans were to be its genius. The book was publicised by the Kaiser and its themes must have been known to the young Hitler who came to pay court to the sickly Chamberlain in 1923. In the later exhortations of Hitler, these ideas of the German master race . . . were to attain their most strident expression . . .

BANTON & HARWOOD, *supra* note 91, at 41-42.

99. For example, Banton and Harwood observe: "The stress on Jews, gypsies, Negroes and others as inferior races enabled the National Socialists to get other Germans to acquiesce in brutalities against which they might otherwise have revolted." *Id.* at 42. I have simply recast this observation in terms of the culture of deindividualization.

100. The argument that racism came to America on 16th-century slave ships is a revisionist theory reflecting the extent to which we are all still prisoners of the idea of race. Slaves came on the slave ships as they had come on slave ships for hundreds of years before that time. And, although the sale of a human being is something to be deplored, I would argue that what made American slavery unique was that the coincidental development of the idea of race made it possible to argue that slaves were slaves not because they had been sold into slavery, but because of something unique about them (and all those who look like them). Since slavery became linked with the immutable and physically apparent, it became something that neither one nor one's progeny could ever escape. For a discussion of the impact of Blumenbach's work on American thinking, see *id.* at 25.

101. The model followed here suggests that scholarship is a high calling. See, e.g., Audain, *supra* note 1, at 1075-76. Under this model, scholars must accept responsibility for their ideas. Although I consider this value an intertemporal one that is just as valuable today as in 1775, Banton and Harwood are more forgiving:

scientific rigor of Blumenbach helped to establish a belief in the validity of race in the minds of both scholars and the general public."¹⁰² With Blumenbach's work began the unambiguous imprisonment of the human imagination based on the idea that human beings, like dogs, might be distinguished on the basis of immutable and apparent physical characteristics.

Some of the leading lights of eighteenth-century thought, including Thomas Macaulay, Alexis de Tocqueville, and John Stuart Mill, almost immediately attacked the proposition that race determines culture, with Mill calling the proposition "vulgar."¹⁰³ Further, Mendel's work in genetics made highly improbable the argument that the morphological typologies of humans were fixed (e.g., a single inherited package which included thin lips, pink skin, etc.).¹⁰⁴ In the early part of this century, the work of anthropologists Boas and Malinowski demonstrated that race bore no relation to the distribution of cultural patterns.¹⁰⁵

The theory that races do not and cannot exist is today on solid scientific footing.¹⁰⁶ "In its simplest terms the difficulty is that each individual and each population is genetically distinct and as there are no clear-cut biological indications of which differences are the most important, there are no biological grounds for deciding which individuals and which populations should go into the same category."¹⁰⁷ Based on the proposition that

There was no reason in principle for rejecting the proposition that race determined culture. It could have been true. Scientists are continually making mistakes but unlike Darwin they are today involved in an intellectual community which usually recognizes them before they reach a popular audience. Criticism of racial theories failed to destroy them at that time not because the proponents or racial theories were evil, prejudiced men, but because the scientific community in the biological field was still very loosely organized and the world outside was eager to utilize the theories before they had won widespread scientific support.

BANTON & HARWOOD, *supra* note 91, at 32-33. Further, it has been argued that the failure of anthropologists to renounce race as a classification is directly responsible for racism. STANLEY R. BARRETT, *THE REBIRTH OF ANTHROPOLOGICAL THEORY* 222-28 (1984).

102. OLIEN, *supra* note 93, at 107.

103. BANTON & HARWOOD, *supra* note 91, at 43.

104. *Id.* at 47.

105. *Id.* at 45.

106. This theory of non-race, however, has yet to carry the day in anthropology. For example, one compilation classifying 1264 cultures in 563 societies around the world still finds it necessary to use race as a distinguishing factor. See GEORGE P. MURDOCK, *ATLAS OF WORLD CULTURES* (1981).

107. BANTON & HARWOOD, *supra* note 91, at 55. So where then do races come from? After all, didn't God create them? I believe this is one of the most powerful questions perpetuating racism. It protects racism by suggesting that it is divinely ordained, and that we, as mere mortals, should not seek to undo what has been divinely ordained. The question reflects a mind that is in an intellectual prison house. Race did not exist until some scholar told the world it existed. The race prison house is contained within another prison house: the prison house of teleology. Teleology is the position within philosophy which says that all things have a purpose. The early Christian Church sanctified the proposition that God is the Mover who provides purpose for all things.

The history of ideas has demonstrated over the past 1000 years that the teleological assertion is not factually true. This is not a debate over whether God is, so much as a debate over what God does. Thus, with respect to inanimate objects, Galileo, Copernicus, and Newton showed that the objects moved as a result of a physical force, rather than a divine one. With respect to nonhuman life, Darwin taught that birds don't fly south in the winter because God wants them to; they fly south because they *can*. Because those that fail to do so freeze to death, the only birds we see are the progeny of those that had the genes directing them to fly south for the winter.

"yesterday's science is today's common sense and tomorrow's nonsense," anthropologist Frank B. Livingstone has argued that on the concept of race, "tomorrow is here."¹⁰⁸ Arguing along similar lines, anthropologist Ashley Montagu reminds us that according to seventeenth-century science, "phlogiston" was a substance presumably present in all material, given off by burning. "Race," says Montagu, perhaps the most vocal of modern non-racists, "is the phlogiston of our time."¹⁰⁹

I take the argument a step further, making my thesis a radical theory of non-race. I argue that not only is it impossible to conceive of the possibility of race, but to assert the very idea of race itself, is racist. This is because once the possibility of a construct of race arises, the formation of beliefs with respect to that construct is inevitable. My radical theory is premised on the social psychology of belief formation.¹¹⁰ The deindividualization that follows on the heels of race is automatic and inevitable. Although it may vary in its degree of perniciousness, this deindividualization denies individuals the right to announce, assert, or otherwise practice their individuality.

Although the role of the cultural apparatus in deindividualization is illustrated here using the sub-subculture of race, an equally plausible tale could

So where do "races" come from? Absolutely: they come from nowhere in particular, because "they" don't exist. It is ludicrous to define a "fly-south" race of birds because a completely different trait may be adaptive to the environment tomorrow. The birds will still be birds, their species definition depending quite logically on their ability to mate with one another. For example, scientists have shown that concentration of pigment in the skin increases among human groups as one approaches the equator and decreases as one moves away from it. *Id.* at 57. What we see are the progeny, possibly after thousands of years of reproduction, of those who happened to have the gene for producing pigment, and who therefore survived life in the sun to reproduce.

True, things do not look good for the teleology story. But that is not to say that Darwin's tale applies to social change in humans. It is a story about physical change. Social scientists today are in agreement that Social Darwinism (never the intention of Darwin) is simply an ethnocentric way for one culture to argue that it is superior to another (e.g., I can tell if you are physically fit, but how would I know if you are socially fit?). See FRIEDL, *supra* note 18, at 103.

For discussions of the demise of teleological explanations in the sciences, see ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 52-57, 135-38 (1988). For a discussion of evolution of races, see ROBIN FOX, *ENCOUNTER WITH ANTHROPOLOGY* 49-82 (1973); ROBERT L. LEHRMAN, *RACE, EVOLUTION AND MANKIND* (1966). For a discussion of Social Darwinism, see generally PIET DE ROOY ET AL., *IMPERIAL MONKEY BUSINESS: RACIAL SUPREMACY IN SOCIAL DARWINIST THEORY AND COLONIAL PRACTICE* (Jan Breman ed., 1990), and CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1991).

108. BANTON & HARWOOD, *supra* note 91, at 58-59 (quoting Livingstone).

109. *Id.* at 59 (quoting Montagu); see also ASHLEY MONTAGU, *RACE, SCIENCE AND HUMANITY* at iii (1963) (noting that, until relatively recently, many things which we now know to be false myths were considered scientific fact, such as the idea that tomatoes and potatoes are poisonous, or that the Earth is flat and the sun revolves around it).

110. See, e.g., MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION AND BEHAVIOR* 12 (1975) (defining a belief as the link between an object and an attribute). My argument is that as long as the object (race) is present, there will be attributes to link to it. This is very different from ethnicity (e.g., cultural grouping on the basis of language, religion, etc.) which is voluntary and generally becomes known only once it has been announced. Notice, however, that ethnocentricity is defined as cultural bias, even if the culture is not ethnically defined. See *supra* note 32. For example, the ethnocentricity stemming from membership in a race-based culture (e.g., the culture of beneficial deindividualization), is discussed below. See *infra* note 115 and accompanying text.

Although other scholars have conducted useful analyses of the different ways in which race is used in the law, none has yet discussed the legal implications of a theory of non-race. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

be told about the moment of deindividuation from a gender standpoint. That tale, however, should be told by someone more qualified than I.

3. Continued Deindividuation & the Paradox of Deindividuation

The deindividuation occurring at the original moment of deindividuation continues beyond that original moment for at least two reasons. First, of the many progeny of those who were originally beneficially deindividuated, those having physical characteristics similar to the members of the original group have little or no incentive to relinquish their beneficial deindividuation. Focusing on the race sub-subculture for the moment, let me hasten to add that I do not believe that this is a "black" or "white" phenomenon, but simply a perceived self-interest phenomenon.¹¹¹ In a parallel universe in which the group seizing control of the cultural apparatus denominated itself "black," the world we have today would not necessarily be different, just reversed in terms of labels.

This perceived self-interest explains miscegenation laws.¹¹² Having had the good fortune of being born with immutable and physically apparent traits that are arbitrarily beneficially deindividuated, one would want nothing less for one's progeny.¹¹³ Yet, against this story of pure self-interest for the average, one finds exceptions that celebrate and vindicate the power of human dignity. Stated in pure race terms, there are whites who challenge racism against blacks simply because of the immorality, unfairness, and intellectual dishonesty of it all. These understanding individuals do so even though, by their challenge, they may be undoing a system which benefits them personally.¹¹⁴

111. This self-interest is only perceived rather than actual, because the diminishing of detrimental deindividuation is likely to improve life for everyone.

112. Miscegenation laws are, of course, all about perpetuating white supremacy. It is my assumption that this perpetuation is consistent with the self-interest of those who are white. For a discussion of miscegenation laws, see generally RONALD D. ROTUNDA ET AL., *CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.8, at 402 (1986); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1228 (1966). See generally ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 64-75 (1972); Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966) (providing an overview of the history of miscegenation laws); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 149 (1988) (comparing the purpose of miscegenation laws in fostering white supremacy to the purpose of sodomy laws in fostering traditional sex roles).

113. Compare this idea with the notion that vigorous interracial breeding should be undertaken to develop a master human race which is devoid of any racial stratifications or related weaknesses. See ROBIN FOX, *The Abolition of Race*, in *ENCOUNTER WITH ANTHROPOLOGY* 67-82 (2d ed. 1991).

114. One example is the group of whites who, risking life and limb, served as conductors in the Underground Railroad. See, e.g., *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847) (holding that notice of a person's status as a runaway slave need not be in writing to uphold a conviction for harboring fugitives); see also Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1020 (1990) ("[Religion] provided a framework for understanding the differences between cruel white overseers and whites who worked on the underground railroad to freedom."). For an interesting fictional piece on the subject, see MARCIE M. STADELHOFEN, *THE FREEDOM SIDE* (1982) (describing a young black slave's escape from slavery guided by a white man).

A second reason why deindividualization persists beyond its original point is because those who have been detrimentally deindividualized use that experience to define the contours of their subculture. The most culturally European of individuals who happens to be "black" is accepted into the African-American subculture. It does not matter that the individual knows nothing about that subculture other than its significant overlap with the detrimentally deindividualized subculture. Indeed, this individual may never have experienced racism. Conversely, someone who happens to be "white" but has a liking or propensity for African-American culture is less likely to be accepted into that culture. Identification of an African-American subculture (beginning with the name, of course) to which anyone can voluntarily belong is critical to distinguishing the African-American subculture from the subculture of the detrimentally deindividualized.

Yet, in the minds of most people, the oppression of racism lies at the very heart of the African-American subculture. This cannot be true, however, since there are many people who participate in the African-American subculture (e.g., music, dance, language) who have not been racially oppressed¹¹⁵ and vice versa. More importantly, those who insist on conflating the African-American subculture with the subculture of detrimental deindividualization will confront the paradox of deindividualization.

The paradox of deindividualization has many representations. At its core, however, it is that those who have been detrimentally deindividualized choose to use their deindividualization to serve a collective purpose. The simple example in the case of race is the individual who must use racism to fight racism. This racism is obvious when blacks seek to exclude whites from social organizations. It is more subtle when blacks use blackness as a basis for social organization. To use race to fight racism is to validate the proposition that psychological traits can be successfully associated with this mythical and arbitrary construct of race, and in particular, the black race. To assume that African-American culture is inextricably intertwined with the blackness of one's skin is admittedly not detrimental deindividualization, but it is still deindividualization. Consistent with the radical theory of non-race advanced above, it is still racism, albeit not as pernicious as other forms. By perpetuating an idea of race, and in particular the black race, we are unwitting accomplices in perpetuating the existence of the very evil we seek to destroy. This is the paradox of blackness, one particular racial version of the paradox of deindividualization.¹¹⁶

115. There is a transmission mechanism between the race sub-culture and the African-American subculture. For example, a strong impetus for the Negro spiritual, or for that matter modern-day rap music, is the racial oppression of black people. Once the artifact has been transmitted into the African-American subculture, however, it is available to all, even those who have never experienced racial oppression. Cf. Niara Sudarkasa, *African and Afro-American Family Structure*, in *ANTHROPOLOGY FOR THE NINETIES* 182-210 (Johnnetta B. Cole ed., 1988).

116. Once again, let me stress that I use the example of blackness because of my familiarity with it. One could advance similar arguments with respect to other "races."

Although little has been written on the paradox of blackness, a good deal has been written on the gender version of the paradox of deindividuation. An example is the "equality" versus "difference" debate in feminist thought. Simply stated, the issue is whether "women want to be equal to men (with the meaning of 'equal' hotly contested), or [whether] women see biology as establishing a difference that will always require a strong recognition and that might ultimately define quite separate possibilities inside 'the human[.]'"¹¹⁷

Each side of the debate responds to the paradox of deindividuation in a different manner. The "difference" side of the debate, at some level, concedes the deindividuation of women by claiming that there are psychological traits associated with the status of womanhood. For example, that a woman will be assumed to possess the psychological traits associated with motherhood, even if she has no desire, intention, or capacity to become a mother. "Difference" proponents are willing to accept this deindividuation so that women can organize to fend off detrimental deindividuation.

On the other hand, the "equality" side of the debate rejects the deindividuation of women altogether, asserting that women are individuals just like men. Each woman should be taken on her own terms according to whatever psychological traits she brings to the table. For this side of the debate, the paradox of deindividuation never presents itself because there is no justifiable reason for which women can be deindividuated.

It is important to note that scholars of feminist thought recognize that there have been many prior incarnations or "past taxonomies" to this debate.¹¹⁸ Indeed, one author has gone so far as to call this debate or tension "this *paradox* we live with."¹¹⁹ My objective in discussing the paradox in feminist thought is to demonstrate that it is a manifestation of a broader paradox of deindividuation: One that confronts all who have been deindividuated, especially those who have been detrimentally deindividuated.

With respect to the paradox of deindividuation, one might argue, "So what? After all, racism and sexism are wars, and a fundamental axiom of warfare is that one should fight fire with fire." True, in a war of physical annihilation, it is better to annihilate than to be annihilated. But in a war over the morality, fairness, or justice of the opponent's posture, adoption of the opponent's posture with gusto is not a strategy that is likely to lead to victory.

117. Ann Snitow, *A Gender Diary*, in CONFLICTS IN FEMINISM 9, 24 (Mariane Hirsch & Evelyn F. Keller eds., 1990).

118. *Id.* at 14.

119. *Id.* (emphasis added). For some interesting insights into the nature of the "difference" debate, see generally Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

Some scholars in the law have begun to challenge the category of gender and to consider the implications of that challenge for the law. This is completely consistent with my argument that the subculture of gender falls within the culture of deindividuation (e.g., a woman is first a member of a group called "women" and second an individual). See, e.g., Adrienne D. Davis, *Toward a Postessentialist Methodology, or a Call to Countercategorical Practice* 12-25 (unpublished manuscript, on file with the *Indiana Law Journal*). Other nonlegal scholars have also recently begun to demonstrate the manner in which our conception of gender is socially constructed. See, e.g., THOMAS LAQUER, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

This point lies at the heart of the "unclean hands"¹²⁰ defense and Ghandi's theory of nonviolent resistance.¹²¹ To clarify this position in the example of race, a distinction must be made between a strategy for social survival (e.g., formation of black organizations because blacks could not be admitted elsewhere) and strategies for fighting racism. Although it is pragmatic for some race-based organizations and policies to continue in the face of persistent racism (something I have personally experienced),¹²² it is counterproductive to deny the existence of the paradox of blackness that reliance on a construct of race makes possible. Investigating the ways of ameliorating that paradox is worthwhile.¹²³

4. A Reason to Hope

Perhaps the most powerful reason to believe that we as a species will eventually eliminate the problem of deindividualization stems from the fact that humanity has made significant progress in eliminating the culture of dehumanization. For example, the continued success and impact of the human rights movement¹²⁴ suggests that many people the world over have become socialized to view others as human and not as subhuman, a marked improvement from the time when language often marked the boundary between "people" and "nonpeople."¹²⁵

Of course, there is much work left to do in the transition to a culture of full individuality. At the personal level, one possible strategy is to approach others with a very loose sense of which culture they might embrace. In this context, our open minds might lead us to seek out the uniqueness of the individuals we encounter. At the broader, less personal level, I believe that because of the nature of the deindividualization, those who have been detrimentally deindividualized should be the focus of us all.¹²⁶

120. See KENNETH H. YORK ET AL., REMEDIES 208-14 (1992).

121. Cf. Cook, *supra* note 114, at 1021-44 (analyzing multiple facets of Dr. Martin Luther King's methodology, including social struggle, experiential deconstruction, and reconstructive theorizing).

122. See *infra* part III.C. (discussing the law and economics of racial discrimination).

123. This discussion on practical dimensions of the Article is revisited. See *infra* note 366 and accompanying text.

124. See WARREN L. HOLLEMAN, THE HUMAN RIGHTS MOVEMENT: WESTERN VALUES AND THEOLOGICAL PERSPECTIVES (1987). See generally A.M. Stuyt, *Human Rights—An Outline, in INTERNATIONAL LAW AND ITS SOURCES* 165 (Wybo P. Heere ed., 1988) (providing an overview of the sources of human rights).

125. "[I]n many languages, especially those of non-Western societies, the word used to refer to one's own tribe or ethnic group literally means 'mankind' or 'human.' This implies that members of other groups are less than human." FRIEDL, *supra* note 18, at 99. Friedl goes on to cite "Eskimo," as meaning "eaters of raw flesh." The Alaskan natives, however, referred to themselves as "Inuit," which means "real people." From their point of view, eating raw flesh is what real people do. *Id.*; see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

126. Since I am a member of the subculture of detrimental deindividualization (i.e., I have experienced racism), it could be argued that I am being ethnocentric in suggesting that everyone should be attuned to my cultural point of view. See *supra* note 32. If I had suggested in this Article that the *only* way to view racism is from the point of view of those who have experienced it, then I would be ethnocentric. Instead, I have suggested unpopular things, such as that the concept of blackness helps to perpetuate racism. I now make a different pragmatic argument on the best way to end racism. Since,

The amelioration of detrimental deindividuation can come from two areas. First and foremost, those who have been beneficially deindividuated, (e.g., men and whites) should be encouraged to see the perspective of those who have been detrimentally deindividuated. The technique here is critical since its net effect may be counterproductive, resulting in deindividuation by, for example, treating all men or whites alike for purposes of indoctrination. Part II of this Article is an attempt to publicize one technique that will not have such counterproductive results. Second, those who have been detrimentally deindividuated need to be mindful of the paradox of deindividuation. One way to accomplish this is to bear in mind the importance and separateness of traditional cultures (e.g., not all who are black are African or African-American and not all who are African or African-American are black).¹²⁷ Part III develops this point further.

II. CRITICAL CULTURAL LAW & ECONOMICS - CULTURAL

Critical Cultural Law & Economics-Cultural ("CCL&Ec-C") is the analysis that results when culture informs law and economics. Subpart A explains in greater detail why law and economics might benefit from the explicit consideration of culture. Subpart B explores how this benefit might result from such a consideration. Subparts C and D present summaries of the law and economics of discrimination. Finally, Subpart E illustrates a cultural critique of the law and economics of discrimination.

A. The Phenomenology of Law & Economics

Clearly, intellectual honesty must be one of the chief defining characteristics of an intellectual discipline. It follows, then, that we are only giving in to intellectual honesty when we choose to make explicit the implicit cultural bias of law and economic analysis. What remains is to show that law and economics has, at times, an implicit cultural bias.

This illustration proceeds first with the understanding that the methodology of law and economics is essentially the methodology of economics.¹²⁸ The methodology of economics, in turn, is the "scientific method." The scientific method has as its central component a testable, refutable theory which

in my consideration, the actions of whites are the *primary* cause of racism, these actions might be attenuated by having whites look at racism from the standpoint of those who are experiencing its consequences.

127. One of my favorite examples of this is a white colleague of mine who is South African by birth and American by choice. He has more knowledge, experience, and affinity for Africa than I could ever possibly have. He is therefore more of an African-American than I. I submit that people who resist this idea are prisoners of the idea of race, who see African-American as a code word for black. As a further example, African-American is only part of what I culturally choose to be. Another very important part of me that I choose to identify with is Haitian-American. Once again, if one is prisoner to the idea of race, whites can be part Irish, part German, etc., but blacks (in America at least) have no such luxury—they are just black. The identity of the individual is subsumed within the construct of race.

128. See ROBERT D. COOTER & THOMAS S. ULEN, *LAW AND ECONOMICS* 1 (1988).

explains a phenomenon. Ideally, the theory will yield predictions or conditional statements about the phenomenon.¹²⁹ At a minimum, the method seems to assume that there is some objective or independent reality or truth which can be discovered.¹³⁰ Also, the method embodies a strong commitment to norms of objectivity and reliability.¹³¹

The second step in demonstrating the cultural bias of law and economics involves understanding the distinction between the "positive" and the "normative." Economists, and therefore lawyer-economists, use the term

129. RICHARD G. LIPSEY ET AL., MICROECONOMICS 19-21 (9th ed. 1990)

130. H. RUSSELL BERNARD, RESEARCH METHODS IN CULTURAL ANTHROPOLOGY 12 (1988). Let me make three observations about this point. First, although Hegel drove home the proposition that there is a reality outside of us that can be discovered, that proposition was one of many in a thousand-year-old debate between the positivists and the nonpositivists (or the relativists and the nonrelativists). The essential project of the relativists or positivists has been to assert the empirically true proposition that "[o]f all things the measure is man" (a quote attributed to Protagoras, an early Sophist). NORMAN MELCHERT, THE GREAT CONVERSATION 41 (1991). From this it follows that the task is one of discovering better methods to assess the empirical reality of which humankind is a part. I would argue that there have been three major nodes in the history of positivism (or relativism, or empiricism). The Sophists can be said to be the original positivists. See Jeffrey A. Standen, Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983, 985-86; cf. JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 67-90 (Jeremy J. Shapiro trans., 1971) (discussing the development of positivism); GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 235-45, 288-310 (1988) (tracing the history of positivism to its roots in the transition to the Enlightenment era). Auguste Comte is widely regarded as the father of positivism (i.e., developed a method of experimentation which involved the separation of fact from value). See BRIAN MORRIS, WESTERN CONCEPTIONS OF THE INDIVIDUAL 233-39 (1991). Finally, the logical positivists extended and radically refined Comte's method (e.g., all claims should be verifiable and those that are not, such as metaphysics and ethics, should be rejected). See MELCHERT, *supra*, at 508-11. The nonpositivist project, which goes by various names (e.g., idealist, students of hermeneutics, or deconstructionist), reacts against positivism (e.g., human actions have meanings that must be interpreted). See ROSENBERG, *supra* note 107, at 19-20. Philosophers generally agree that in this age-old debate, "[c]urrently, the sophists seem to be in the ascendancy." MELCHERT, *supra*, at 580. It is equally clear, however, that positivism has refined itself over time in response to the criticisms of nonpositivists. See generally Standen, *supra*, at 985-91 (discussing the development of positivism in the legal academy).

My second observation is that one of the fundamental arguments between the positivists and the nonpositivists is an argument about the nature of moral truth. Positivists, it is argued, are more likely to submit to a consequentialist theory of moral truth (e.g., utilitarianism focuses on the outcome of action, seeking the greatest good for the greatest number), while antipositivists are more likely to subscribe to deontological theories of moral truth (e.g., Kant's a priori moral principles derived from pure reason). See ROSENBERG, *supra* note 107, at 176-84.

As my third observation, I submit that since the time of the Sophists, science has and will continue to remove many of our questions from the moral plane because of its commitment to factual truth (e.g., believing in a heliocentric theory of our solar system is not a moral question, as the church once asserted). See generally JOSEPH BEN-DAVID, THE SCIENTIST'S ROLE IN SOCIETY: A COMPARATIVE STUDY 65-66, 70-71 (1971) (describing the development of scientific thought in the 15th and 16th centuries); ROBERT K. MERTON, THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 242-50 (1973) (describing how Puritanism led to the elimination of religious restrictions on scientific study). I am, therefore, in favor of a naked positivism that has a commitment to the discovery of truth. In the meantime, consistent with the positivistic principle of "fallibilism" (i.e., knowledge of a given subject is incomplete and may be wrong, see MELCHERT, *supra*, at 470, 582), it seems to me eminently positivistic for positivism to continue to be informed by the insights of nonpositivism. This position is consistent with a realist philosophy of the social sciences. This realism, in turn, is consistent with a commitment to what works (i.e., Pragmatism). Hegel was confident that our species would eventually arrive at a state of absolute knowledge. See *id.* at 406. See generally MORRIS, *supra*, at 188-214 (discussing the Hegelian-Marxist tradition). I, on the other hand, remain agnostic regarding that proposition.

131. BERNARD, *supra* note 130, at 12.

"positive" to refer to the descriptive: what is or what will be. "Normative" refers to what should be, which involves a value judgment.¹³² The scientific method, therefore, can only describe and explain what is; it offers no substitute for the value judgment involved in deciding what ought to be.

One need not challenge the premise of this distinction to note that it is missing something. In particular, we who subscribe to the distinction between the positive and the normative have given insufficient attention to the use of the positive to defend the normative. I will refer to this use as the "ideo-apologetic." It is more accurate to suggest that the scientific method can give rise to at least three kinds of analyses: the positive, the normative, and the ideo-apologetic.¹³³

There are several things to note about the ideo-apologetic. First, it can occur consciously or unconsciously. Second, it is more likely to occur where the empirical data is scant or ambiguous. Third, it is more likely to occur on issues where strongly held ideologies diverge greatly. Finally, it is more likely to occur among those who have training in rhetorical advocacy (e.g., philosophers, lawyers).

Of course, when asked *why* we advocate the ideologies that we do, especially in the face of scant, ambiguous, or sometimes wholly contradictory data, most of us would probably respond that it "feels right." It is at this point that we all subscribe to phenomenology as a theory of knowledge. Phenomenology refers to the individual's ability to "*sense* reality and to describe it in words, rather than numbers—words that reflect consciousness and perception."¹³⁴

132. LIPSEY ET AL., *supra* note 129, at 115. The value-free nature of the social sciences was something originally championed by the great sociologist Max Weber. He saw the distinction between the "is" and the "ought" as a way to maximize the effectiveness of the social scientist. ROSENBERG, *supra* note 107, at 186-90. Weber, of course, was reflecting the original idea of Comte.

133. Only recently have economists begun to discuss critically the fact that economic analysis can serve as a rhetorical instrument. I take this discussion a step further and suggest that economics can be used as a rhetorical instrument in defense of a preexisting ideology. Seminal works on the topic of economics as rhetoric include: THE RHETORIC OF ECONOMICS (Edward Elgar ed., forthcoming 1995); Donald N. McCloskey, *The Rhetoric of Economics*, 31 J. ECON. LIT. 481 (1983); Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752 (1988).

134. BERNARD, *supra* note 130, at 22 (emphasis in original). There are three points to note here. First, phenomenology as a construct has a history. It originated in 1807 with Hegel in his attempts to answer the question of whether there is a reality independent of our knowledge of it. MORRIS, *supra* note 130, at 188-99. The answer is "yes"; we know this by engaging in the phenomenology (*i.e.*, watching the experience) of the phenomenon called the human mind (*i.e.*, its development within a single individual or in the history of the world). See MELCHERT, *supra* note 130, at 404-05. It was for Husserl, however, approximately 100 years later, to make phenomenology a complete method of (empirical) inquiry:

For Husserl, phenomenology is (a) a science which is (b) purely descriptive, rather than deductive or explanatory, (c) which sets aside in a systematic way all prior assumptions and presuppositions, (d) whose subject matter is consciousness—its structure, its contents, and its "intended" objects—and (e) whose outcome is a description of essences—e.g., an account of *what it is to be* an act of perception or the object of a remembering.

MELCHERT, *supra* note 130, at 538 (emphasis in original). Husserl's work has been modified and reinterpreted, most notably at the hands of his most famous student, Martin Heidegger. *Id.* The phenomenology to which I refer in this Article is essentially Husserl's methodology.

Phenomenological analysis of one kind or another has found a warm reception among legal scholars. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Donald H.J. Hermann, *Phenomenology, Structuralism,*

The third and final step in showing the cultural bias of law and economics is to realize that what we sense as social reality is very much a function of who we are, and that who we are is inextricably intertwined with the cultures and subcultures to which we belong. It then follows that one's choices of economic theories and the manner in which one uses them to understand the law will, at times, reflect one's particular cultural biases. This suggests that *ideo-apologetic* analysis is also more likely to be conducted on issues that have different meanings in different cultures.

It was suggested above that intellectual honesty is one reason to have phenomenology influence law and economics. Additionally, a law and economic analysis cognizant of phenomenology will be more intellectually powerful, and will have greater predictive accuracy and credibility. If law and economics is to continue to be more than an intellectual exercise, its practitioners must continue to value these traits.

In suggesting that law and economic analysis is at times phenomenological, I set forth in sharp relief the historic debate¹³⁵ between the positivists (economics) and the nonpositivists (phenomenology). There are many points of disagreement between the positivists and the nonpositivists, not the least of which is that the positivists advocate the use of the scientific method while the nonpositivists do not. More importantly, there are many types of nonpositivists.¹³⁶ Therefore, it is possible to imagine almost complete irreconcilability between positivism and some forms of nonpositivism (e.g., Humanism, a form of nonpositivism, holds that humans construct reality, while positivism holds that there is objective reality to be discovered).¹³⁷ On the other hand, it is clear that positivism can only be aided by other forms of nonpositivism (e.g., phenomenology). Since anthropology is arguably the most phenomenological of the social sciences,¹³⁸ I now turn to a consideration of its method.

Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena, 36 U. MIAMI L. REV. 379 (1982); Robert J. Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993).

The second point is that the pursuit of phenomenology is consistent with a project of scientific realism (i.e., no one really does *all* the things that good logical positivists are supposed to do, see *infra* note 247). After scientific realism, "[t]here are now four ways to go: critical realism, a 'metaphysically neutral' phenomenalism (or empirical realism), skepticism, or some version of Kantism." MANICAS, *supra* note 2, at 248. Phenomenology is consistent with empirical realism.

Third, when the "feels right" approach is applied to questions of ethics or morality, as it often is, positivists call this the "emotive theory of ethics." See MELCHERT, *supra* note 130, at 511.

135. See ROSENBERG, *supra* note 107, at 205; see also *supra* note 130.

136. See ROSENBERG, *supra* note 107, at 20.

137. BERNARD, *supra* note 130, at 21-22.

138. See *id.* at 22-23.

B. Cultural Critique & the Methodology of Cultural Anthropology

A cultural critique of the use of law and economics can take at least three forms, each of which may occur independently of, or concurrently with, one another. The first form attempts to demonstrate how two analysts with significantly different perspectives or from different subcultures might see the law and economics of the issue differently, or how their cultures inform the law and economic analysis that each conducts. A second form might demonstrate how the contextualization of the issue would result in a different kind of law and economic analysis. A third form—which will be discussed in the remainder of this Subpart¹³⁹—might argue that the methodology of cultural anthropology was not followed.

Cultural anthropologists confront two problems when they cross into other cultures to analyze them. First, they must hold in abeyance any sense of their own culture. Stated differently, they must hold their cultural bias in check.¹⁴⁰ Second, they must develop an accurate sense for the culture that they are analyzing. Clearly, one who seeks to apply law and economic analysis to a partly or completely foreign culture or subculture encounters similar problems.

There are four analytical methods used by cultural anthropologists: *participant observer*, *unobtrusive observer*, *content analysis*, and *disguised field observation*.¹⁴¹ These methods differ in their capacity to address the two problems discussed above. They share, however, a unifying theme: one cannot fully analyze a different culture without somehow getting a sense of it. Analysis on the basis of first principles alone is antithetical to cultural analysis as envisioned by the cultural anthropologist. Each of the four methods will be very briefly discussed below.

The participant observer method involves just that: the anthropologist participates in the life of the culture while simultaneously observing it.¹⁴² Indeed, "[t]he strength of participant observation is that you as a researcher become the instrument for both data collection and analysis through your own experience."¹⁴³ The successful participant observer must develop and

139. Part II.E, below, attempts to apply all three forms of the cultural critique of law and economics. It shows how my membership in the culture of detrimental deindividuation (*i.e.*, I have experienced racism) leads me to view the economics of discrimination differently than others who presumably have not experienced racism (*e.g.*, Posner and Epstein). I also attempt to contextualize the deindividuating (*i.e.*, racist) incidents that I discuss by providing the reader with a sense of who I am as an individual.

140. One of the more recent movements in cultural anthropology is critical anthropology. One of the hotly debated questions within critical anthropology is the extent to which it is possible for anthropologists to hold their cultural biases in check. *See, e.g.*, HENRY McDONALD, *THE NORMATIVE BASIS OF CULTURE* 2 (1986). *See generally* JOHN BRENNMAN, *CULTURE AND DOMINATION* 42-45 (1987) (discussing the conflict between interpretive and explanatory understanding and the intersubjectivity involved with both).

141. *See generally* BERNARD, *supra* note 130.

142. *Id.* at 148. For a full review of the participant observation technique, *see generally* JAMES P. SPRADLEY, *PARTICIPANT OBSERVATION* (1980).

143. BERNARD, *supra* note 130, at 152.

exercise certain skills, such as learning the language of the subject culture,¹⁴⁴ building a memory of observations about the culture,¹⁴⁵ and maintaining naïveté.¹⁴⁶ This last skill seems particularly critical since this is how the anthropologist keeps her own cultural bias from infiltrating her observations. It may also be one of the most difficult skills to master since it requires an otherwise knowledgeable and successful individual to exercise a great deal of humility.

In addition to the skills that she must develop, the participant observer must go through many stages. These span from "initial contact"¹⁴⁷ to "leaving the field."¹⁴⁸ Perhaps one of the most difficult of the stages, however, is "culture shock[, which] is an uncomfortable stress response."¹⁴⁹ In this stage "nothing seems right."¹⁵⁰

In contrast to the participant observer technique in which the anthropologist is "obvious and reactive,"¹⁵¹ the remaining three techniques require the anthropologist to be unobtrusive and nonreactive. The first of the three, the unobtrusive observation,¹⁵² is self-explanatory. The next technique, content analysis, is "a catch-all term covering a variety of techniques for making inferences [about the culture] from 'texts,'"¹⁵³ with the word texts being broadly construed to include fiction, nonfiction, songs, films, and other media.¹⁵⁴ Finally, in disguised field observation, a researcher "pretends to actually join a group, and proceeds to record data about people in the group."¹⁵⁵ A good example of this is John Griffin's *Black Like Me*, which records the shock of a white man who becomes black and lives in the South in 1961.¹⁵⁶

Having summarized the nature of culture and the cultural critique of law and economics, it is possible to apply all of this to the law and economics of discrimination. In order to fill in some background, a synopsis of the literature on the law and economics of discrimination will be presented here, followed by a more detailed summary.

In the law and economic analysis of discrimination, there is a critical debate over whether market forces can dismantle a discriminatory system of employment. Free market analysts contend that discrimination is inefficient,

144. *Id.* at 153.

145. *Id.* at 156.

146. *Id.* at 157.

147. *Id.* at 163.

148. *Id.* at 169.

149. *Id.* at 164-65.

150. *Id.* at 165.

151. *Id.* at 271.

152. *Id.* The specific way in which this can be done is through "direct, reactive observation, including continuous monitoring and spot sampling of behavior." *Id.* at 272.

153. *Id.* at 297.

154. *Id.* at 297-98.

155. *Id.* at 300.

156. *Id.* at 300-01. Bernard makes the point that Griffin was a journalist but that anthropologists use the same techniques. He also cites Laud Humphreys' work in the homosexual community. *Id.* at 300-01, 303.

and will therefore be driven from the market. Antidiscrimination analysts take the opposite position, contending that market forces will be too slow, incapable, or insufficient to drive out discriminating employers without the aid of antidiscrimination laws.

This debate is informed by a critical distinction between "animus" and "statistical" discrimination. Animus discrimination arises from an irrational hatred or distaste for association with a particular class of individuals, usually grouped by race or sex. Statistical discrimination, on the other hand, is motivated by "rational" factors, such as voluntary groupings or the use of race as a proxy for common or average characteristics.

Three major theories dominate the critical debate: Becker's competition paradigm, Epstein's search model, and Posner's heuristic model. All three theories provide arguments against the forcible (nonmarket) elimination of discrimination. Becker's competition paradigm concentrates on the principle that for the employer, animus discrimination is utility-maximizing, not wealth-maximizing, and therefore market forces will drive out firms which discriminate. Epstein's search model postulates that prospective employees will search out the maximum wealth situation for themselves, and the difference between opportunities available with and without antidiscrimination laws will be negligible. Although his theory recognizes that some discrimination will not be driven from the marketplace, Epstein equates efficiency with desirability, and so considers desirable that which remains. Posner's heuristic model concerns itself primarily with the efficiency and desirability of statistical discrimination as a heuristic aid in selecting from among applicants.

Two theories challenge these three theories. First, Donohue's acceleration of benefits theory argues that society would prefer to have the benefits of antidiscrimination sooner rather than later, and therefore antidiscrimination laws are justified. Second, McAdams applies a relative social preference theory to conclude that discrimination is the search for relative social status—arguing, among other things, that the stigma of discrimination is, therefore, readily understandable. Parts II.C and II.D will provide further detail on all of these theories.

C. Pro-Free Market Law & Economic Theories of Discrimination

1. Becker's Neoclassical Model of Discrimination

The neoclassic model of employment discrimination suggests that the market will eliminate discriminatory employers.¹⁵⁷ One variation of the model is Becker's competition paradigm, which posits that discrimination

157. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). Similar theories based on Becker's model can be found in RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* (1992), and RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 651-63 (4th ed. 1992). The Becker model of discrimination is alive and well. See Cooter, *supra* note 4. Note, however, the broadest theoretical challenge to that model in McAdams, *supra* note 4, (manuscript at 43-45, 98-104).

occurs as a result of individual preferences, or "tastes."¹⁵⁸ For example, one person may have a taste for nonassociation with members of another race, so that contact with those individuals imposes nonpecuniary costs—lost utility.¹⁵⁹ This results in the avoidance of valuable transactions which would involve such contact. Society as a whole suffers a loss because these efficient transactions never occur, so their potential gain is never realized.¹⁶⁰ This inefficient state is at disequilibrium because the market will favor those actors who are responsive to the market rather than shackled to nonpecuniary preferences. Employers who discriminate will pass up more highly qualified employees for lesser qualified employees merely to satisfy their nonpecuniary preferences. As these inefficient, discriminating employers are forced from the market by the more efficient, nondiscriminating employers, society will move toward a higher-producing, more efficient state of equilibrium.¹⁶¹

Becker laments the black radical position that blacks should avoid contact or competition with the white world because he believes that it will only result in the loss of additional beneficial trades while not yielding any measurable gains.¹⁶²

2. Epstein's Variation on the Neoclassical Theory

Epstein's model considers the problems of both animus and statistical discrimination.¹⁶³ Epstein accepts the neoclassical theory that all animus discrimination is undesirable and will be removed by market forces, and distinguishes animus from statistical discrimination which, he concedes, will not be responsive to market pressures.¹⁶⁴ He argues, however, that statistical discrimination is desirable and therefore, its invulnerability to market forces is not a flaw of the free-market model.¹⁶⁵

In analyzing animus discrimination, Epstein supplements Becker's theory with his search paradigm: essentially, all workers are free to offer their services to employers and to continue to search until they maximize their job opportunities.¹⁶⁶ While discrimination may limit the opportunities of some groups, on the whole the best opportunities available will not vary widely. As one group is turned away repeatedly, their value rises compared to the remaining workers in the pool, until the group is eventually selected.¹⁶⁷

Epstein accepts that free market forces will not eliminate all discrimination, acknowledging that statistical discrimination will remain, and going so far as

158. BECKER, *supra* note 157, at 11-12.

159. *Id.*

160. *Id.*

161. *Id.* at 39-47.

162. *Id.* at 24.

163. EPSTEIN, *supra* note 157, at 28-78.

164. Statistical discrimination can be viewed as an effective counter to Becker's neoclassical model because if discrimination is efficient it will not be eliminated by market forces.

165. EPSTEIN, *supra* note 157, at 66-68.

166. *Id.* at 31-32.

167. *Id.*

to say that such discrimination is desirable.¹⁶⁸ He argues that places of business will become racially stratified because of natural affinities, language similarities, and preferences of music, food, holidays, etc.¹⁶⁹ This stratification is desirable because it reduces conflict resolution costs,¹⁷⁰ allows individuals to avoid distasteful associations,¹⁷¹ and allows for informal enforcement of promises.¹⁷²

3. Posner's Heuristic Model of Statistical Discrimination

Posner's heuristic model suggests that some statistical discrimination results merely from employers using race as a proxy for other characteristics.¹⁷³ This proxy occurs when information costs are so high that employers find it economical to decrease the applicant pool by employing stereotypes to make hiring decisions. As an illustration, Posner suggests that if average black productivity is less than average white productivity, employers might pay blacks a lower wage than whites, although any particular black individual may have average or above-average productivity.¹⁷⁴

This view of discrimination counters Becker's neoclassical model. If discrimination is efficient, it will not be eliminated by market forces, as these forces merely serve efficiency. However, Posner offers statistical discrimination as proof that there is no economic justification for antidiscrimination laws, which would necessarily eliminate this efficient form of discrimination.¹⁷⁵

D. Antidiscrimination Law & Economic Theories of Discrimination

1. Donohue's Acceleration of Benefits Theory

One response to Becker's neoclassic model is Donohue's acceleration of benefits theory, which accepts Becker's paradigm but argues from within it that antidiscrimination laws are desirable. Considering that the ideal state is the nondiscriminating society,¹⁷⁶ the benefit yielded by antidiscrimination

168. *Id.* at 66-68. For a contrasting view, see the discussion of the costs of statistical discrimination *infra* at Part II.D.4.

169. EPSTEIN, *supra* note 157, at 62.

170. *Id.* at 63. One example of conflict resolution Epstein suggests is choice of music: he assumes that if the employees are monoracial, they will have no difficulty in selecting background music for their business setting.

171. *Id.* at 68. Other authors have noted that respecting such illegitimate preferences risks lending them implicit approval. See, e.g., John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1591 (1992).

172. EPSTEIN, *supra* note 157, at 69-71.

173. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 516 (1987).

174. *Id.*

175. See POSNER, *supra* note 157, at 657-60. But see *infra* parts II.D-E (outlining conflicting opinions of the efficiency of statistical discrimination).

176. More than merely a normative valuation, the nondiscriminatory society is favorable from the standpoint of efficiency: because discrimination (in Becker's paradigm) is inefficient, a more efficient system will result in a pareto advantage.

laws is that this nondiscriminatory state of affairs is reached more quickly than would otherwise be possible.¹⁷⁷

In his analysis, Donohue borrows the turnpike theorem from optimal growth theory: the turnpike may take one a bit out of the way at first, but in the long run it is likely to save time.¹⁷⁸ To make an empirical analysis, he balances the short-term costs against the long-term gains, and concludes that the antidiscrimination laws yield an overall benefit.¹⁷⁹ In addition, antidiscrimination laws provide a normative good: the weight of discriminatory inefficiency, previously borne by all, is now borne exclusively by the discriminators.¹⁸⁰

Posner argues that Donohue's efficiency analysis of the acceleration of benefits theory may be incorrect because it fails to consider the administrative costs and added inefficiencies associated with driving out the discriminators at a faster speed—distorting the natural process.¹⁸¹ Posner relies on an analogy to a shipping company which has discovered a new technology allowing it to build faster, more efficient vessels. He points out that scrapping the current, out-dated ships is not economically efficient; it is more logical to gradually phase them out.¹⁸²

Donohue defends the acceleration of benefits theory by making a distinction between situations where sunk costs exist and those situations where they do not.¹⁸³ He argues that Posner's accelerative inefficiencies are phantom costs: the disequilibrium (discriminatory) position is inefficient and the equilibrium position is efficient. Thus, the sooner society progresses from one to the other, the better.¹⁸⁴ To counter Posner's analogy, he points out that if the ships had no cost, there would be no argument for continuing to use them.¹⁸⁵ This analogy is better applied to employment discrimination, he argues, because driving employers from the market is more like choosing between chartering ships and chartering airplanes: if the airplanes are cheaper and quicker, there is no reason to hire a ship. Similarly, since society has no investments in discriminating employers, and nondiscriminating employers are more desirable, it would be logical to choose to patronize the latter over the former.¹⁸⁶

177. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1422 (1986).

178. *Id.* at 1431.

179. *Id.* at 1423-30.

180. *Id.* at 1429.

181. Posner, *supra* note 173, at 513-14.

182. *Id.* at 515.

183. John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 526 (1987).

184. *Id.* at 525-27.

185. *Id.* at 526.

186. *See id.*

2. Relative Social Preference Theory

A second theory which disputes the neoclassical model is the relative social preference theory.¹⁸⁷ This theory maintains that people are not driven by absolute tastes, but rather by a desire for commodities which give utility in a relative, rather than absolute, setting.¹⁸⁸ This competition for relative position occurs on both an individual and a group scale—in this case within racial groups.¹⁸⁹ The idea behind the relative social preference theory was developed as a response to Becker's household production theory, which argued that traditional consumer theory failed to address much behavior because it considered "tastes" to be a black box which precluded further analysis.¹⁹⁰ In response to this attack, Becker developed a new theory, which separates goods and commodities.¹⁹¹ His neoclassic discrimination analysis, however, suffers from the same flaws the household production theory was designed to address.¹⁹²

The action of one group in discriminating is not blindly accepted as the result of an irrational taste, but rather is seen as an attempt to produce the commodity of improved group status. McAdams offers two reasons why this view of discrimination is more desirable than the neoclassical view.¹⁹³ The first is a set of empirical studies showing that this phenomenon occurs even in groups assembled solely for the purposes of study. This suggests that when the groups come together voluntarily on the basis of perceived similarities, the effect would be even stronger.¹⁹⁴

The second argument for the relative social preference theory is the idea that it performs more consistently than the neoclassic model in predicting discriminatory behavior.¹⁹⁵ Under the latter, the behavior of whites in the segregated South was incomprehensible. What taste could account for why they would oppose using the same luncheonette, bathroom, or drinking fountain as blacks, while simultaneously employing them as domestic help to clean their belongings, cook their food, and rear their children? Why would these tastes extend to opposing interracial marriages or black politicians, when these people would most likely never be encountered? These same problems are easily explained by relative preferences. Whites would not tolerate associations that would impute equal or superior status to blacks; only those

187. Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992); see also McAdams, *supra* note 4, (manuscript at 94-96).

188. McAdams, *supra* note 187, at 3-5. The principal idea is that people's desires are not independent: they may interact either positively (empathy or altruism) or negatively (status-seeking or looking to obtain a position superior to others). In the context of the relative social preference theory, discrimination is seen as a negatively interdependent preference. *Id.*

189. *Id.* at 93.

190. See *id.* at 95 (citing George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 84, 88 (1977)).

191. *Id.* at 94.

192. *Id.* at 95.

193. *Id.* at 96.

194. *Id.* at 96-97.

195. *Id.* at 97-98.

associations which indicated lower status were acceptable.¹⁹⁶ In short, these whites behaved "as if" they were aware of their relative preferences.

This model suggests that discriminatory harm is manifested as stigma to the individual and overall economic loss to society. The former is the result of the all or nothing nature of the relative preference: If the competing groups were equal, there would be no stigma attached to being associated with any group. But because minority groups may be ostracized from the society by a majority, they may be fully deprived of the commodity of social status.¹⁹⁷

Black activists respond to this deprivation by arguing that blacks should have no contact with whites. Becker's argument against this position is that blacks would lose all transactions, rather than merely the ones which discriminatory whites would refuse them.¹⁹⁸ Yet, by a different measure blacks gain; blacks are removed from the relative social status competition. Since blacks are no longer involved in the zero-sum struggle to be white, blacks can invest these resources in making absolute gains. This results in "empowerment," strength turned inward to build and strengthen, rather than outward to fight conflict.¹⁹⁹

The relative social preference theory responds to Posner's Cosean analysis by positing that the analysis is wholly inapplicable in this situation. Where relative social status is at stake, a worker cannot bribe his employer because the very nature of bribing causes a loss of relative social status. Thus, it may be more advantageous to a black who seeks this relative status to remain at an all-black firm for \$75 per day rather than switch to a firm which will pay him \$90 per day but pays white workers \$100 per day. In this situation, a law which compels the latter firm to hire the black worker at \$100 per day will earn him more than the \$10 per day it will cost the firm.²⁰⁰ In addition to this individual gain, society will gain from the elimination of wasteful relative preference competition.

Discrimination causes harm to society when resources are expended in pursuit of relative preferences.²⁰¹ The competition itself will result in a zero

196. *Id.*

197. *Id.* at 98.

198. BECKER, *supra* note 157, at 24.

199. See McAdams, *supra* note 187, at 98-99.

200. For a fuller discussion, see *id.* at 100-01.

201. *Id.* at 21. McAdams illustrates this with a prisoner's dilemma. Assume two mines: a dirty mine with a wage of \$200 per week and a clean mine with a wage of \$150 per week. Two miners, A and B, each with a relative preference for earning more than the other, and each desiring to work in a clean mine, must choose employment independently. Each miner ranks his preferences as follows (ranked from most desirable to least, with the miner's view of the situation in parentheses):

(1) Work in dirty mine, other in clean one (win).

(2) Both work in clean mine (tie).

(3) Both work in dirty mine (tie).

(4) Work in clean mine, other in dirty one (lose).

A examines his choices and realizes that he would rather work in the dirty mine regardless of whether B works in the clean mine ((1) is preferable to (2)) or the dirty mine ((3) is preferable to (4)). B's analysis is similar, so both miners end up in situation (3), when they would both rather be in (2), which would yield a Pareto benefit: increased health with no loss of relative preferences. As a whole, they have suffered a loss as a result of their competition, defining this situation as a zero-sum game.

sum,²⁰² so any resources spent in its furtherance will be wasted, and society will be the poorer for it.

One difficulty with the relative social preference theory is the concept of free riders—if it is easier for each individual in the group to enjoy the benefits of the work others have done, no one will take responsibility for the work.²⁰³ Two points counteract the free rider problem, however. First, in some situations, discrimination will not result in transaction costs. This is the situation when an employer is faced with choosing between two equally qualified applicants; since only one can be selected, rejecting the one not from the employer's group will be costless.²⁰⁴ Second, groups have an effective means to discourage free riders: awarding status within the group. The group bestows elevated intragroup status upon individuals who positively elevate the group's status—through business success or fame, for instance—while lowering the status of those who do not contribute. Those who cannot raise the group's status level through positive achievements do so by lowering the status of other groups. This theory is borne out by the apparent inverse relationship between racial prejudice and personal achievement.²⁰⁵

3. Further Responses to Epstein's Search Model

There are four more minor objections to Epstein's search model. First, there are practical considerations and distributive issues. In reality, entry to the employment marketplace involves a point of entry disparity—where is each individual's point of entry?²⁰⁶ Also, this analysis involves some distributive questions: Epstein's implicit appeal to the freedom of contract for all is an empty appeal in a world in which those who are equally talented and equally willing to work do not have an equal opportunity to do so.²⁰⁷ Unfortunately, Epstein fails miserably to consider the issues of rectification that are made patent by such disequality.²⁰⁸ Indeed, in a truly unlibertarian manner, he appears to oppose the making of reparations to the descendants of slaves.²⁰⁹

Further, at least one author has suggested that modern business systems may be so complicated that the simple two-party models used by neoclassic economics cannot accurately predict business behavior.²¹⁰ The problem is that middle managers often have the power to hire and fire workers, but are insulated from the influence which would be produced by greater or lesser

202. For an example of this zero-sum game, see *supra* note 201.

203. McAdams, *supra* note 187, at 99.

204. *Id.*

205. *Id.*

206. See Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1230-33 (1992) (arguing that in the pre-1964 South, it was nearly impossible for "blacks to acquire a 'normal distribution' of talents in such specialized professions as, for example, medicine, engineering, or law").

207. George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1468 (1992).

208. *Id.*

209. *Id.* at 1469.

210. Leroy D. Clark, *The Law and Economics of Racial Discrimination in Employment* by David Strauss, 79 GEO. L.J. 1695, 1696-97 (1991).

profits. Because they have more contact with workers hired, they may be more interested in indulging their discriminatory preferences than saving the corporation's profits.²¹¹

Second, there are disincentives for investment in human capital. Similar to the argument against statistical discrimination,²¹² there is an argument that animus discrimination also poses a disincentive to invest in human capital. The argument rests on economic grounds: discrimination in a certain occupation restricts rewards available for investment in training for that occupation, so groups discriminated against should invest less in that area. As discrimination becomes broader, the disincentives increase as well.²¹³

Third, in employment discrimination situations, as in the pollution scenarios, transaction costs will prevent the market from reaching the efficient state.²¹⁴

Finally, there is the preference shaping analysis. Because the law shapes individual preferences, it must not lend validity to discriminatory preferences. Governmental power should be exercised with humility and caution, but when it acts, preferences may soften over time, thereby reducing the psychological costs to those who would otherwise discriminate.²¹⁵

4. Further Responses to Posner's and Epstein's Statistical Discrimination

Several commentators have advanced ideas which suggest that while it may be advantageous to the individual firm, statistical discrimination is harmful to society. For instance, Donohue suggests that allowing employers to use racial proxies rather than forcing them to evaluate individuals creates disincentives for individuals to invest in human capital.²¹⁶ An example is when blacks, on the average, score thirty points lower on a standardized exam which is related to job performance. If employers dismiss black applicants on the basis of this statistic, there is little or no incentive for a black student to invest time or energy in improving his score on the exam. The result of this loss of human capital is borne by society in general, which is deprived of the benefits which flow from an investment in human capital.

A second flaw in allowing employers to use race as a proxy for individual traits or abilities is the theory of compensatory justice.²¹⁷ This idea posits that any average or stereotypical inferiority of blacks is a consequence of slavery and historical injustice. As a result, society has an obligation to

211. *Id.*; see also POSNER, *supra* note 157, at 658 (arguing that in other contexts, such as selling homes, integrating schools, and permitting hotel stays, there is an inverse relationship between the degree of interpersonal contact and the willingness to suspend discriminatory attitudes).

212. For a discussion of the costs of statistical discrimination, see *infra* text accompanying note 224.

213. See Issacharoff, *supra* note 206, at 1223 (discussing Cass Sunstein, *Why Markets Don't Stop Discrimination*, in REASSESSING CIVIL RIGHTS 23, 29 (Ellen F. Paul et al. eds., 1991)).

214. Donohue, *supra* note 171, at 1588.

215. *Id.* at 1591.

216. See Donohue, *supra* note 183, at 532-33.

217. David A. Strauss, *The Law and Economics of Racial Discrimination*, 79 GEO. L.J. 1619, 1627-29 (1991).

correct this wrong by providing affirmative action until those traces of injustice have been erased. The laws of the market can be expected to effect justice only by allowing all individuals to begin on an equal footing.²¹⁸

A final criticism is that allowing statistical discrimination will cause racial stratification and demoralization to worsen.²¹⁹ This action brands a particular race as inferior, injures its economic well-being, and deprives qualified applicants of employment opportunities.

E. A Cultural Critique of the Law & Economics of Discrimination

In this Subpart, I provide a cultural and phenomenological critique of the law and economics of discrimination. I do so first by contextualizing the discussion by providing some biographical information and relaying one of my personal experiences with racism. I hope the reader will indulge me. Second, on the basis of this information and the analysis I have conducted up to this point, I provide a list of selected cultural criticisms of the law and economics of discrimination. Throughout my discussion, I make references to Richard Epstein and Richard Posner. Let me emphasize at this point that although I disagree vehemently with their respective positions on the law and economics of discrimination, I happen to think very highly of both of these individuals and of their contributions to the law. Indeed, I have gone on record regarding my opinion of Judge Posner's work.²²⁰

1. Contextualizing Race Discrimination

Here is the individual I am.²²¹ I am a black male in my middle thirties. Culturally, I was born in Haiti, I immigrated to the United States at the age

218. See J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2085 (1992).

219. See John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1724-28 (1991).

220. See, e.g., Linz Audain, *Of Posner, and Newton, and Twenty-First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions*, 23 LOY. L.A. L. REV. 1215 (1990).

221. The reader should note that in pursuing this particular kind of autobiographical contextualization, I follow the lead of those critical race theory proponents who argue that minority legal scholars should bring autobiographical examples into their legal analyses. See, e.g., Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991); Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991). Of course, Patricia Williams' classic story of being denied admission into a Benetton store is an example of this genre that is often discussed. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991); see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 835-38 (1993).

Several of my colleagues who commented on a previous draft of this Article, noticed the dramatic change in my "voice," and the highly personal and emotional nature of the incidents related in this portion of the Article. Let me make two points about that comment. First, in reading my cultural critique, my colleagues experienced exactly what I intended them to experience—the intensity of my feelings about racism. Although we all, of course, have intense feelings, we just have those feelings about different things and experiences. The point I make in this Article is that the economic analysts who purport to model my cultural reality need to step into my shoes and understand my feelings before they put the math and models to paper. Second, all is not lost: at the end of my critique, I return to my objective-sounding/law professor voice for the remainder of the Article.

of six, and I speak French and Creole with native fluency and my Spanish is passable. I was raised in a Haitian household but have been influenced by African-American, European-American, and Hispanic-American norms and values. I have been particularly influenced by the Haitian norm of individual achievement. Therefore, despite being born and raised in relative poverty, I have, by many standards, succeeded. I am an accomplished classically-trained vocalist and a good pianist. I am also a good athlete, actor, and acceptable martial artist. I have won academic awards, scholarships and fellowships, and membership in honorary societies. I have amassed a high number of degrees from some of America's most outstanding universities. I hold a job at one of America's better law schools.

Getting to this point in my life, however, has been fraught with difficulties. Casual conversations with my white male colleagues reveals that I have either been fired or failed to receive job offers from a disproportionate number of jobs. It also seems that my colleagues and I have been subject to different standards of job-related acceptable behaviors in our lives. Oh, and the police: I have lost count of the number of times I have been stopped, questioned, asked for identification, and had mug shots taken of me. Some of my white male colleagues have never had a single such experience. Oh, and the people: I have lost count of the number of times I have had white people clutch belongings, assume I was the janitor or the help,²²² write me anonymous "nigger" notes or "inform" me about my animalistic origins or sexual proclivities, or pretend that I wasn't there.

Neither does *being* at this point in my life insulate me from any of this garbage. I shall relate a single experience. It is the fall of 1990. A woman I am trying to impress and I have gone to the eastern shore of Maryland for a romantic weekend together. We arrive in the late afternoon on Friday, and spend the balance of the afternoon and early evening driving around town sightseeing. We find our bed and breakfast and check in for the weekend. The couple running the establishment seems friendly enough, so we ask them for recommendations for dinner. They inform us that the best but also most expensive place is a restaurant affiliated with a boat club on the outskirts of town. We call the restaurant and confirm that no reservations are necessary and that they stop seating at 10:00 p.m.

We arrive at the restaurant. It is 8:45 p.m. when we walk through the front doors. The first thing I notice is that although there are quite a number of people in the restaurant, there are absolutely no people of color, *anywhere*. At this point, we are still two feet from the entrance to the restaurant. A white woman stands at a lectern approximately five to six feet from us. She looks at us, does not smile, and says nothing. She turns around, looks at the bartender, and then looks at a white man who is wearing a dark suit. She steps away from the lectern. The man in the suit steps forward.

222. See generally Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (defining as microaggressions those "'subtle, stunning, often automatic . . . exchanges' . . . [that amount to] 'incessant and cumulative' assaults on black self-esteem") (footnotes omitted).

The man in the dark suit informs us that the restaurant stopped seating fifteen minutes ago. The blood begins to rush to my head. I try to remain calm and in my most controlled voice, I protest. I tell him that we called and were told that the restaurant stopped seating at 10:00 p.m. He then tells me that they had underestimated the demand, and on this particular night the restaurant is lacking several items on the menu. There is, however, another restaurant "across the bridge" that will be able to accommodate us. At this point, my palms are cold and my breathing is heavy. I am truly outraged, ready for a physical confrontation. For, not only has this man insulted, degraded, and humiliated me and the intelligence that I have spent all of my life trying to develop, he has done so in the presence of a woman whom I am trying to impress.²²³ How dare he? It is a long, lonely, and silent moment as I stare icily at this man and weigh my options. I wheel about. My date and I exit the restaurant.

The gauntlet has been laid down. In the parking lot, I notice a black dishwasher who is emptying the trash. I approach her. I tell her to go inside the restaurant and tell her boss: (a) I know what he's doing; (b) my date and I are going to walk back inside that restaurant and we will be seated; and (c) if we are not seated, I am a lawyer, and I will sue the restaurant for every penny it has. She enters the restaurant, and reemerges. She tells me that we should go back inside the restaurant. After we are seated, I notice a second white man in a dark suit staring at us. He hurriedly approaches the first white man in a dark suit. They huddle. There is much nodding and looking in our direction. They separate. There are no apologies. As the evening progresses I notice that white couple after white couple entering the restaurant is seated by the woman at the lectern without incident. So, a small victory. But the weekend is ruined because we are both depressed and apprehensive. My God, when will this madness end?

2. The Name of It All

First of all, who made up this name—the law and economics of *discrimination*—anyway? Discrimination is a nice clinical term to describe what some people would like to believe they are *doing*. But "discriminated against" is not what I *feel*. I feel oppressed. This guy doesn't even know my *name* and right off the bat he tells me I'm not worthy to sit and have a meal in a restaurant of this quality. I feel insulted, degraded, and humiliated. You bet I take it personally. So would Richard Epstein; or Richard Posner. They would know of no other way to take it but personally. Neither do I. When I do take it personally, many phrases come to mind. "Discriminated against" is not one of them.

223. One colleague, Adrienne Davis, has astutely pointed out to me the gendered nature of this story. What happened here was that while in the act of displaying my peacock feathers, I had been "unpeacocked" by another male. A most disconcerting (male) event.

3. Statistical vs. Animus Discrimination

Oh, you mean he was practicing *statistical* and not *animus* discrimination? Well gee, that makes me feel so much better. For a second there I thought it might have been animus discrimination. Now that I know it was only *statistical*, that surely makes my pain go away. Who came up with that distinction anyway? It seems to be a distinction without a difference. Does the pain in my psyche know or care that it is statistical and not animus discrimination? The effect is the same. Oh, but he was being efficient and rational. Assuming, for the sake of argument, that he was—so was Hitler. Exactly how informative is that observation to the problem at hand?

In this context, those words—statistical, animus, efficient, rational—are very far away from my experience; indeed, they are an entire culture apart. Since I am an economist, I understand those words in any other context. But from my standpoint as a member of the subculture of detrimental deindividuation, the words look like an elaborate smoke screen, intentionally or unintentionally contrived, to justify some pretty odious behavior. No, it is not okay because it is “just” statistical discrimination. All that characterization does is to perpetuate the deindividuation. *I* am the individual who has been intentionally harmed. To call it statistical is to involuntarily place me into an arbitrary group and to justify harming me on that basis. In *no* other body of law is that done. This man must be forced to deal with me—person to person. Of course, to call it statistical and therefore *desirable* (à la Epstein)²²⁴ for me and my date to suffer this kind of harm, is—well I won’t say what I think about that observation.

Then again, this is not even good statistics, let alone efficient decision-making. Neither Posner nor Epstein seem to have an appreciation for how much deindividuation biases the process of statistical inference. For example, let us assume that a white male employer has had a string of five bad white male employees from an employee pool containing an equal number of black and white workers. The employer does not say: “Oh, those white guys are bad workers.” He says: “I guess I’m having some bad luck.” That is beneficial deindividuation.²²⁵ The white workers get the benefit of the doubt. Assume that the same employer has a string of three good black workers and two or even one bad black worker. Conclusion? Of course, “everybody knows it,” those blacks are bad workers. “I had a string of good

224. See the discussion *supra* at Part II.C.2. The magnitude of the statistical bias that my date and I experienced is well illustrated by a conversation that I had with Jerome Culp of Duke University about an earlier draft of this Article. After reading that draft, Jerome insisted that I had to identify the race of my companion. I agreed to do that with neither of us discussing why that was important. We did not have to. Both of us knew that if my companion had been a white woman then the statistical bias would have worked “in my favor” and I would have been validated as a “socially acceptable” black, worthy of a seat in the restaurant. This did not happen, however, because my companion was a woman of color. By no stretch of the imagination should this footnote be construed as a diatribe against interracial dating or mating. See, e.g., *supra* note 112. The footnote merely addresses the manner and virulence with which “statistical discrimination” operates.

225. See *supra* part I.C.1.

luck for a while there. It has run out, so I don't think I'll hire one again." That is the nature of detrimental deindividualization. It creates a statistical bias against the arbitrarily defined group that is so deeply entrenched and accepted that it isn't even questioned. Indeed, even some *black* employers engage in it. It is obviously not efficient.

4. The Market Will Drive Out Discrimination

Say what? You have to be kidding me. Richard Epstein, *sure I believe in the market just like the next guy. But did you see what that guy just did to me and my date? He was "discriminating" precisely because of the market. So what the hell do you mean the market will drive out discrimination?* And this is what is being done to my face over whether I get to sit down and have dinner. God only knows what has gone on behind closed doors when I have not gotten, or was fired from, *jobs*.

So let us assume, for the sake of argument, that the market could have driven this discriminatory restaurant out of business. What would *you* have done, Richard, waited for the market? Right. Richard, I have seen you rant and rave at conferences when people have dared to disagree with your *ideas*, let alone insult your dignity or your manhood. I am willing to guess that a guy of your persistence and intellectual skill would not have allowed that restaurant owner to live. And that is just one incident in a lifetime of detrimental deindividualization. So should I wait for the market every time? I don't think so. Of course, under your scheme, Richard, not only would my date and I have been insulted, but we would have had no recourse at all because the civil rights laws would not exist.²²⁶

5. Some Cross-Cultural Education

True, if I held an endowed chair at the University of Chicago Law School,²²⁷ I too would find it hard to believe that there were aspects of the American cultural fabric that I did not fully appreciate. But that is indeed the difficult part of cross-cultural study: the humility required to submerge one's bias and open one's mind exacts a heavy toll—especially on those who are highly accomplished intellectually.²²⁸ For example, in arguing that the workplace would become racially stratified because of natural affinities, language similarities, holidays, etc.,²²⁹ Richard Epstein clearly does not appreciate the difference between the subculture of detrimental deindividualization (e.g., "blackness") and African-American culture.

226. Dismantling the antidiscrimination laws is the natural end product of Epstein's argument: since the laws distort the operation of the market, and prevent "desirable" statistical discrimination, they are inefficient and undesirable. See *supra* part II.C.2.

227. Richard Epstein is the holder of the James Parker Hall chair at the University of Chicago Law School.

228. See *supra* text accompanying note 140.

229. See *supra* text accompanying note 169.

Richard, "black" people are people from all cultures and walks of life who have been lumped together into this category by a stupid idea ("race") that stipulates that human beings can be segregated on the basis of external physical appearance, and arbitrarily announces that pigmentation of skin—not thumb size, or hair color, or earlobe size, or eye color—is the most important basis for that segregation. To test this idea, Richard, just open the phone book and find the synagogue where the "black" Jewish²³⁰ congregation worships, *and visit it*. I would guess that there, you will find people who have a much higher "language" and "holiday" affinity to you than they do to me despite our "racial" similarity. While you're at it, you might want to subscribe to *Ebony* or *Jet* or *Hispanic*. Get a sense for the contextualization of racial oppression in America. And, since I know that you are a person of good faith, I know that you will allow yourself to *feel*, Richard, *feel*, about things and people that you may have never felt about before. Let *that* feeling inform your law and economic analysis.

One more thing: we should all thank God for the Donohues²³¹ and McAdamses²³² of the world.

III. CRITICAL CULTURAL LAW & ECONOMICS - LAW & ECONOMICS

A. The Method of CCL&Ec-L

In contrast to CCL&Ec-C, where culture informs law and economic analysis, CCL&Ec-L is law and economic analysis informing culture. There are at least two questions that arise in connection with CCL&Ec-L. The first question is how one might go about performing CCL&Ec-L. The second question is why one might expect the performing of CCL&Ec-L to be a fruitful exercise. Each will be taken in turn.

First, how might CCL&Ec-L provide its critique of a legal problem situated in another culture or subculture? There are at least two ways in which this might occur. In the first method, the legal or law-related problem is characterized using principles of cultural analysis. The cultural analysis is then characterized in terms of principles of economic analysis. In the second method, the legal or law-related problem situated in another culture is directly characterized using principles of economic analysis. I am assuming that principles of economic analysis are universal and can therefore be pressed into the service of cross-cultural analysis.

230. I do not believe that this statement deindividualizes Professor Epstein. As an alumnus of the University of Chicago Law School, I have anecdotal information which suggests that Professor Epstein has strong associations with the Jewish culture. Once again, to be as clear as possible, I focus on Jewishness because I understand that this is a culture that is of importance to Professor Epstein. It is not my intention to essentialize or stereotype Professor Epstein in any way.

231. For a discussion of Professor Donohue's viewpoint on the economics of racial discrimination, see *supra* part II.D.1.

232. For a discussion of Professor McAdams' viewpoint on the economics of racial discrimination, see *supra* notes 187-97 and accompanying text.

As an example of these universal economic principles, consider that markets have always existed and probably will always exist.²³³ Recently, Eastern Bloc governments have made the political decision to stop suppressing and indeed to encourage their markets.²³⁴ Accordingly, Western economists have been retained by these governments to instruct them in the nature of the appropriate universal and cross-cultural principles of economic analysis.²³⁵ CCL&Ec-L merely represents an effort to use these universal principles to analyze the legal dimensions of a culturally unique problem that is not located within the traditional economic domain.

It should also be clear that CCL&Ec-L essentially advocates the export of Western law and economic analysis as a means to analyze legal issues that arise within non-Western or Third World societies. True, in the analysis below, I use CCL&Ec-L to analyze a legal problem—the efficacy of critical race theory—that is situated within a subculture of American culture: racial minorities. If my international law students are any indication, however, there is great interest in exploring the extent to which principles of law and economic analysis can be usefully applied to non-Western and Third World societies (e.g., the economic analysis of African family law).²³⁶ Indeed, as a native of a Third World country myself, I can attest to the utility of this endeavor. CCL&Ec-L merely provides a vehicle for organizing and facilitating this export of law and economic analysis.²³⁷

Secondly, one might expect CCL&Ec-L to be a fruitful exercise because of the strongly positivistic orientation of economic analysis. I think the answer is the same whether one analyzes a legal problem with or without the intermediation of cultural analysis.²³⁸ In order to further illuminate this answer, it may be useful to pause and briefly consider the nature of this positivistic orientation.²³⁹

The basic positivistic model to which most economists subscribe focuses on the role of theories. "Theories are used in explaining observed phenomena. A

233. See generally H.J. CLAESSEN & PIET VAN DE VELDE, *EARLY STATE ECONOMICS* (1988); RICHARD HALPERN, *THE POETICS OF PRIMITIVE ACCUMULATION: ENGLISH RENAISSANCE CULTURE AND THE GENEALOGY OF CAPITAL* (1991).

234. See PAUL HOLLANDER, *DECLINE AND DISCONTENT: COMMUNISM AND THE WEST TODAY* (1992); YOUNG C. KIM & GASTON J. SIGUR, *ASIA AND THE DECLINE OF COMMUNISM* (1992). Compare the predictions of GEORGE C. GUINS, *COMMUNISM ON THE DECLINE* (1956) (diagnosing symptoms of demoralization, a discredited system, incurable evils, and the imminent failure of Soviet socialism).

235. See, e.g., Patrick Howe, *Peace Corps Pair Means Business in Russia*, STAR TRIB. (Minneapolis), Nov. 21, 1992, at 1A; Arnold R. Isaacs, *International Learning to Deal in Amerikanski*, WASH. POST, Aug. 1, 1993, at R10; Donald Smith, *Peace Corps Volunteers Teach Russians the Rudiments of Capitalism Economics*, L.A. TIMES, Oct. 18, 1992, at A8; Harry Stainer, *Peace Corps to Help Baltic States, Russia*, PLAIN DEALER (Cleveland), May 15, 1992, at 4B.

236. This paper is in the works with one of my African L.L.M. students.

237. This will definitely be exporting. Law and economics is almost completely an American, British, Canadian, and Australian phenomenon. I am unaware of the existence of a sizeable body of law and economics scholarship extending beyond the Anglo/American jurisprudential systems.

238. This is a reference to the two methods of conducting CCL&Ec-L—with or without cultural intermediation, discussed above.

239. This is a continuation of the discussion of positivism found above. See *supra* note 130 and accompanying text.

successful theory enables us to predict behavior."²⁴⁰ Theories are composed of assumptions, variables, and hypotheses.²⁴¹ Assumptions reflect what one chooses to believe for purposes of the theory or the conditions under which the theory holds.²⁴² The validity of assumptions depends not so much on their intrinsic truthfulness, but on the theory's ability to predict.²⁴³ Variables are magnitudes that take on different values and may be explained within the theory.²⁴⁴ Finally, the hypothesis is a statement of the relationship which is said to exist among the variables.²⁴⁵ Ideally, both the hypothesis and the predictions flowing from it can be falsified by appealing to the evidence.²⁴⁶

It is true that this basic positivistic model has been challenged by philosophers of science²⁴⁷ and by some within the economics discipline.²⁴⁸ However, in economics, at least, the basic positivistic model has not been supplanted by any other model.²⁴⁹ These challenges, therefore, need not be addressed in order to answer the question of why CCL&Ec-L may prove to be a fruitful exercise.

The answer is that in the case where one uses economics to analyze the cultural analysis of a legal or law-related problem, economics can be said to provide an analytical dimension that cultural anthropology does not. The phenomenological nature of the methodology of cultural anthropology requires that its practitioners focus on observations and description of observations.²⁵⁰ This phenomenology provides the basis for the "biased use of theory" critique of CCL&Ec-C.²⁵¹ Conversely, CCL&Ec-L provides a critique of cultural analysis in the form of a rigorous economic theory that supplements the description provided by cultural analysis. The rigor of the economic analysis is made possible especially because of the almost axiomatic

240. LIPSEY ET AL., *supra* note 129, at 19.

241. *Id.* at 19-20.

242. *Id.* at 20-21.

243. *Id.* at 21.

244. *Id.* at 20.

245. *Id.* at 21.

246. *Id.* at 22.

247. See, e.g., GEOFFREY SAMUEL, *MIND, BODY AND CULTURE: ANTHROPOLOGY AND THE BIOLOGICAL INTERFACE* (1990). The basic idea here is that there are very few scholars who believe that *all* of the things stated in the paragraph describing logical positivism can be, need to be, or are actually done. See, for example, MANICAS, *supra* note 2, at 243, for an extensive listing of various philosophers of science and the various points on which they have departed from the classical logical positivists' position. This does not imply that one must jettison logical positivism entirely. It implies only that the classical model is an ideal, the conditions of which are rarely completely met.

248. See, e.g., H.L. BHATIA, *HISTORY OF ECONOMIC THOUGHT* (4th ed. 1985); JOHN M. FERGUSON, *LANDMARKS OF ECONOMIC THOUGHT* (2d ed. 1950); *THE HISTORY OF ECONOMIC THOUGHT* (Mark Blaug ed., 1990); JÜRGE NIEHANS, *A HISTORY OF ECONOMIC THEORY: CLASSIC CONTRIBUTIONS, 1720-1980* (1990).

249. My armchair empirical basis for this statement is that the traditional positivistic model described above is still the model that is taught to most beginning economics students. See, e.g., WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* (4th ed. 1988); *GREAT IDEAS FOR TEACHING ECONOMICS* (Ralph T. Byrns & Gerald W. Stone eds., 4th ed. 1989); CAMPBELL R. MCCONNELL, *ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES* (9th ed. 1984); PAUL SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* (13th ed. 1989).

250. See *supra* note 134.

251. See *supra* note 140 and accompanying text.

nature of some of the assumptions of economic analysis (e.g., people respond to incentives), as well as the mathematical form of many economic hypotheses.²⁵²

The reason for suggesting that phenomenology be tempered with positivism, the objective of CCL&Ec-L, is the same reason for suggesting that positivism be tempered with phenomenology. That is, it is clear that no single system of obtaining knowledge can lay claim to consistently obtaining knowledge under all circumstances, or even under circumstances peculiar to it. Put differently, the price of truth is the tolerance of error.²⁵³ Therefore, it seems appropriate to suggest that the objective of obtaining knowledge is achieved most effectively when the use of one system of obtaining knowledge is tempered by the use of a competing system.

Of course, instead of tempering the phenomenology of a cultural analysis of a legal problem, CCL&Ec-L can directly provide an economic analysis of a cross-cultural legal problem. This is very simply the application of principles of economic analysis to law, but this time to law of a different culture. This analysis would involve the use and application of the principles that law and economics scholars have developed over the past fifty years.²⁵⁴

B. Application: A Cultural Analysis of the Kennedy/Bell Debate

This Subpart and the one that follows apply the form of CCL&Ec-L which provides an economic analysis of the cultural analysis of a legal or law-related problem. The law-related problem analyzed in this case is the debate between Kennedy (and his supporters) and Bell/Delgado/Matsuda (and their supporters)

252. Why are mathematics and logic so important? The insight of the logical positivists was that mathematics and logic "provide a framework in which we can move from one true factual statement to another, i.e., they license inferences." MELCHERT, *supra* note 130, at 508. At this point, nearly all economic academic journals are mathematical, and sometimes to a considerable degree. See, for example, the *Journal of Mathematical Economics*. A course in mathematical economics is required in virtually all graduate curricula, in addition to the mathematical content of other courses in the graduate program (e.g., microeconomic analysis). GRADUATE STUDY IN ECONOMICS 1 (Harold F. Williamson ed., 2d ed. 1969).

253. This is a basic epistemological and pragmatic idea (see, e.g., the discussion of fallibilism, *supra* at note 130) that is often flouted. This is true perhaps because of the human desire to find panaceas. One manifestation of the latter tendency is the phenomenon of "groupthink," in which individuals surround themselves only with others who think like they do. The leader of the group erroneously believes that the combined intellectual benefits of a group of individuals are being enjoyed (e.g., different intellects able to point out errors in the reasoning and analysis of other members). This belief is erroneous because the benefits have been eliminated either through the group membership selection process or through overt and subtle pressures for individual group members to conform to the group's thinking. The solution, of course, is to celebrate and encourage dissent or alternative points of view until such time as a consensus has been reached or a decision must be made. My idea of tempering positivism with phenomenology, and vice versa, is a reflection of this solution in another dimension. For a discussion of groupthink, see IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS (2d ed. 1982). Groupthink in legal settings is further explored in JAMES C. FREUND, ADVISE AND INVENT: THE LAWYER AS COUNSELOR-STRATEGIST AND OTHER ESSAYS 28-33 (1990).

254. For an argument and illustration of principles of law and economics that are different from principles of economics, see Audain, *supra* note 1, at 1038-45.

regarding the success of critical race theory.²⁵⁵ In this Subpart, I summarize the nature of the debate, conduct a cultural analysis of the debate, and conduct an economic analysis of that cultural analysis.

1. The Nature of the Kennedy/Bell Debate

Critical race theory has been defined as "the work of progressive legal scholars of color²⁵⁶ who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination."²⁵⁷ Historically, although this group of scholars—critical race theorists—was not formally organized until 1989,²⁵⁸ one could argue that critical race theory began with the original 1973 publication of Derrick Bell's book on race and the law.²⁵⁹

In 1989, Randall Kennedy, a black man, and at that time an untenured member of the Harvard Law faculty, published a piece in which he challenged what he saw as the dominant theses of critical race theory. The "exclusion thesis . . . is the belief that the intellectual contributions of scholars of color are wrongfully ignored or undervalued."²⁶⁰ The racial distinctiveness thesis provides that the racial oppression experienced by all minority scholars will cause them to view the world from a different perspective, a perspective that will ultimately reveal itself in their work.²⁶¹

Kennedy noted that critical race theorists had "succeeded in making 'the race question' a burning issue for a substantial number of persons in legal academia."²⁶² Nevertheless,

[a]t the same time, the writings of Bell, Delgado, and Matsuda reveal significant deficiencies—the most general of which is a tendency to evade or suppress complications that render their conclusions problematic. Stated bluntly, they fail to support persuasively their claims of racial exclusion or

255. Kennedy, in his article, referred to the critical race theory work of Bell, Delgado, and Matsuda. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1760-87 (1989). It is not my intention to slight the valuable contributions of Professors Delgado and Matsuda by shortening the reference to "Kennedy/Bell."

256. There appears to be some question as to whether the work of scholars who are not scholars of color can qualify as critical race theory. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 758 n.2 (noting that the definition of critical race theory makes reference only to "scholars" and not "scholars of color").

257. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991). Delgado and Stefancic have identified at least nine "themes" that are addressed by critical race theory scholars. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461-62 (1993).

258. Peller, *supra* note 256, at 758 n.2.

259. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992). Indeed, Delgado and Stefancic cite the most recent edition of Bell's book in their bibliography on critical race theory. Delgado & Stefancic, *supra* note 257, at 473.

260. Kennedy, *supra* note 255, at 1745-46.

261. *Id.* at 1746.

262. *Id.* at 1748.

their claims that legal academic scholars of color produce a racially distinctive brand of valuable scholarship.²⁶³

The response to Kennedy's article included a colloquy,²⁶⁴ a response to the colloquy,²⁶⁵ several law review articles,²⁶⁶ and even articles in the lay press.²⁶⁷ For purposes of this Article, let me suggest that the responses to Kennedy's article can be classified as personal or intellectual or a combination of both. The personal responses have asserted that in writing his article, Kennedy was "insincere,"²⁶⁸ "willing to speak for whites,"²⁶⁹ and a "[traitor] to his race."²⁷⁰ The more intellectual responses have been various and sundry. For example, Ball has demonstrated how Kennedy is inaccurate in arguing that critical race theorists seek to invoke white guilt in their work.²⁷¹ Barnes has argued that contrary to Kennedy's assertions, minority scholars do not seek to privilege their experience by making their perspective explicit. "Instead, we offer an essential rejoinder to the 'false universalism' prevalent in the myth of equality of opportunity."²⁷²

Espinoza's response to Kennedy's article raises five arguments. First, she argues that Kennedy's bias is evident since he argues that the articles of minority scholars are not worth citing, while giving every indication that he has not read any of them.²⁷³ Second, Espinoza contends that the criteria announced by law school hiring committees are mythical, since most law school professors have not met them.²⁷⁴ Third, she states that race should (and does) count, as evidenced by the fact that Kennedy's article has received notoriety primarily because he is black.²⁷⁵ Next, she points out that his article increases the risk to minority scholars of publishing race conscious work in the future.²⁷⁶ Finally, Espinoza argues that

263. *Id.* at 1749.

264. See Scott Brewer, *Introduction: Choosing Sides in the Racial Critique Debate*, 103 HARV. L. REV. 1844 (1990).

265. Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991).

266. See, e.g., Carter, *supra* note 221; Farber & Sherry, *supra* note 221.

267. See Brewer, *supra* note 264, at 1846 n.8 (citing Derrick Bell, *Letter to the Editor*, N.Y. TIMES, Jan. 26, 1990, at A30).

268. *Id.* at 1846 n.7 (citing Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1874 n.20 (1990)).

269. *Id.* at 1846 (quoting Bell, *supra* note 267, at A30).

270. *Id.* n.10 (commenting that Professor Robert Williams made those remarks at a panel on New Voices in Legal Scholarship, sponsored by the Association of American Law Schools (Sept. 8, 1989) (videocassette on file with AALS)).

271. Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1858-60 (1990).

272. Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1865 (1990) (footnote omitted) (arguing that critical race scholars offer a rejoinder to false universalism).

273. Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1880 (1990).

274. *Id.* at 1882-83.

275. *Id.* at 1883.

276. *Id.* at 1885.

Kennedy's call for individualism reinforces exclusion by delegitimizing the commonality of the experience of otherness many minorities feel with other minorities and express in their scholarship. Although there is much individual divergence, focusing on the individual before we recapture that which is our shared difference would result in a cacophony of voices unrecognized, indecipherable, and overwhelmed by the dominant discourse.²⁷⁷

2. A Cultural Analysis of the Kennedy/Bell Debate

I offer here a cultural analysis of both sides of the debate. At the outset, I wish to make it clear to the reader that, based on my cultural critique of the law and economics of discrimination, my bias is in favor of the Bell side of the debate. I believe that minority scholars *can* have a unique perspective on the law. In the text that follows, I attempt to put my bias aside to provide an objective cultural analysis of both sides of the debate.

a. Bell's Side of the Debate

i. The Unchallenged Assumption

It is possible to characterize the response of those on the Bell side of the debate as an impassioned attempt to validate the existence and define the boundaries of the subculture of which they are members—detrimental deindividualization.²⁷⁸ Such a response is warranted. From the standpoint of Bell's proponents, Kennedy, by his identity and through the substance of his statement, has struck at the very essence of the culture of detrimental deindividualization. The tacit interpretation of Kennedy's thesis by those minority scholars who support the Bell side is that "surely there is no uniformity of perspective of the members of the subculture of detrimental deindividualization. For here I, Kennedy, stand before you, a putative member of this subculture, and not only do I not have your perspective, but I have one that is diametrically opposed to yours."

Although the observations of the proponents of the Bell side of the debate are possessed of great insight, their interpretation of Kennedy's critique, as suggested above, is a fundamentally unchallenged interpretation. Consider the personal dimension of the interpretation. As a threshold matter, that interpretation fails to realize that membership within the subculture of detrimental deindividualization is a statistical event.²⁷⁹ That is, Kennedy's outward appearance is what is defined in Western society as "black." Yet, although the experience of detrimental deindividualization—racism—has happened to a high percentage of individuals who are "black," it is statistically possible that

277. *Id.* at 1886.

278. For a discussion of this activity of defining the subcultural boundaries, see *supra* Part I.B.2.

279. See *supra* note 14.

those experiences may not have occurred to Kennedy. As another matter, even if Kennedy has experienced detrimental deindividualization, it is conceivable that that subculture may not be as strong—may not span as many of his social relationships—for him as it is for other individuals.²⁸⁰ Finally, it is conceivable that Kennedy has given different meaning to his experience of detrimental deindividualization because for him it is differently contextualized (e.g., embedded within a class subculture).²⁸¹ In short, Randall Kennedy does and should be allowed to speak for the individual who is Randall Kennedy. I take issue with the substance of his views below.

ii. The Paradox of Blackness

In providing their tacit interpretation of Kennedy's work, the proponents of the Bell side of the debate grapple with the paradox of deindividualization and, in particular, the paradox of blackness. This paradox essentially refers to the situation where one is forced to use racism to fight racism, where a less pernicious form of racism involves perpetuating the myth of the "black race."²⁸² One manifestation of the paradox in this context is the one already alluded to: the implicit assumption that Kennedy, by virtue of the pigment of his skin, should possess a particular point of view. The paradox inheres in the fact that such an assumption is being invoked to fortify a subculture that seeks to combat racism.

Another manifestation of the paradox is that the Kennedy/Bell debate may be, at its heart, a debate about how best to deal with racism in light of the paradox of deindividualization. Kennedy's underlying message may be that there is a fundamental intellectual flaw in the notion that one might use deindividualization to fight deindividualization. Assuming, for the sake of argument, that the latter is Kennedy's underlying message, then the response of the Bell side of the debate is at best inferred. This inferred response is that although it is true that Kennedy may have an interesting academic point, the reality of racism is still too virulent for its victims to be concerned about intellectual niceties. The message from Williams' battlefield analogy²⁸³ seems apropos: Kennedy, pick up your own sword or be impaled by your enemy's—this is no time to debate the morality of the use of the sword.

Yet, the battlefield analogy both demonstrates and obfuscates. It demonstrates the clarity with which some see the relationship between the state of racism in America and the paradox of blackness. It obfuscates in suggesting

280. For a discussion of the strength of a subculture, see *supra* text accompanying notes 57-58.

281. For a discussion of contextualization and embedded subcultures, see *supra* text accompanying notes 59-61.

282. See *supra* text accompanying note 116.

283. A summary of this story can be found in Brewer, *supra* note 264, at 1846 n.10 (citing *Robert Williams' Parable*, Critical Race Theory Newsletter, Oct. 27, 1989, at 2). Professor Williams' parable describes a Native American elder who is trying to negotiate a peace with the white soldiers who are invading his land, while an unruly underling undermines the elder's position of strength by revealing that much of that strength is merely illusory. Of course, the underling represents Kennedy, and the Native American culture represents critical race theory.

that the postponement of an answer to the paradox is itself an answer. The response by Kennedy here may be that racism in its current form is not that virulent, that there is no enemy, and that racism will continue to be with us as long as we continue to rely on racism to fight racism. This last argument is one reason why the paradox is so problematic.²⁸⁴ Responses to these arguments will be considered below; for now, it will be sufficient to observe that, with limited exceptions,²⁸⁵ those on the Bell side of the debate have not fully addressed the question of how one deals with the paradox of blackness.

iii. Prisoners of Race

The final point is that the Kennedy/Bell debate makes clear how much we are all still very much prisoners of this mythical construct called race, and in particular, the black race. The notion that Kennedy is a "traitor to his race" is wholly motivated by the implied prescription that Kennedy should be loyal to his race. What is Kennedy's "race" and who made that decision? Was he consulted in the matter? The proposition that Kennedy's race is a God-given, "natural" attribute unfortunately reflects a profound ignorance about the arbitrary, uninformed, unscientific nature of a decision made by one man more than 200 years ago.²⁸⁶ We would do well to minimize the extent to which we rely upon and perpetuate this vicious and dangerous idea called race.

b. Kennedy's Side of the Debate

i. General Alignment of Views

There is much in what Kennedy has said that is consistent with the analysis outlined above and, more generally, with the ideas developed in this Article. For example, the idea that all minority scholars *must* have unique perspectives upon the law is flatly inconsistent with the idea of progress toward a non-racist society.

284. This argument refutes the idea that the fight against racism is analogous to traditional warfare. The moral nature of the battle requires those who fight to pay attention to the paradox. See *supra* text accompanying notes 120-23.

285. Espinoza concludes her article by commenting: "Although there is much individual divergence, focusing on the individual before we recapture that which is our shared difference would result in a cacophony of voices unrecognized, indecipherable, and overwhelmed by the dominant discourse." Espinoza, *supra* note 273, at 1886. It is clear that she is speaking of the paradox of deindividuation. She proposes ignoring the individual and the paradox because to do otherwise would eliminate the community (e.g., the culture of detrimental deindividuation). But the essence of the community is the pain of deindividuation that its members commonly feel. The point is to eliminate deindividuation, even among the members—even though that which eliminates the pain necessarily entails eliminating the community. The solution that I propose is to tolerate deindividuation among minorities (using minority status to define groupness) while ameliorating it (by recognizing individuality, encouraging non-minority membership in groups, and using traditional culture as a basis for grouping), and while simultaneously using the group to fight the broader, more pernicious deindividuation. See *infra* part IV.C.

286. The theory of non-race is discussed *supra* at note 110 and accompanying text.

ii. Confronting the Paradox

An answer to the paradox of blackness is that we must, for a time, have it both ways. We should aggressively pursue our goal of a non-racist society. Instead of postponing or avoiding it, however, we should confront the paradox for what it is, minimizing the extent to which we must be racists for the purpose of fighting racism. As an illustration, a cultural analysis of some of Kennedy's views that places minimal reliance on Kennedy's race and racial allegiance follows.

As a threshold matter, some of the views espoused by Kennedy²⁸⁷ are the views of one heavily influenced by the dominant cultural apparatus.²⁸⁸ Because that apparatus is controlled by individuals who have experienced beneficial deindividualization (namely, white males) views consistent with beneficial deindividualization are the views espoused by the cultural apparatus. As an individual, Kennedy is free to espouse those views. If he does, however, he should suffer of no delusion that he is bringing something new to the table. On the other hand, if Kennedy wishes to write from the perspective of those of us who have been detrimentally deindividualized, or for that matter, if he wishes to balance his perspective, then he needs to get "into the soup." He needs to recognize the incredible power of seeing the same images and hearing the same arguments thousands of times from the cultural apparatus. Then, he needs to open his mind to experience the experience of those of us who have been detrimentally deindividualized.

What Kennedy finds may astound him. There are no qualified minority applicants? I must again beg the reader's indulgence: Randy, I am one of a handful of blacks in the United States who engage in law and economics.²⁸⁹ If degrees stand for anything in the qualification picture, I am, as far as I know, one of two blacks at an American law school with a J.D. and a Ph.D. in economics.²⁹⁰ Additionally, I hold five graduate degrees, three of them professional degrees, with a sixth on the way.²⁹¹ Yet upon *inquiry* (they did not even have to go looking for me!), the country's better paying law schools

287. E.g., Kennedy, *supra* note 255, at 1762-63 (asserting that no qualified minority applicants exist).

288. The cultural apparatus and its domination are discussed *supra* at text accompanying notes 62-63.

289. Based on my personal knowledge, in addition to myself, Professors Benoit (NYU), Culp (Duke), and Hylton (Northwestern) are black professors teaching law and economics at American law schools. Relying on their self-identification in the 1993-94 American Association of Law Schools Directory as minority professors, there are nine other minority scholars teaching law and economics at American law schools. They are Professors Baquero (Puerto Rico), Hutchison (University of Detroit-Mercy), Lassiter (Cincinnati), Robertson (Texas Southern), Haddock (Northwestern), Koch (William & Mary), Yen (Boston College), Rodriguez (Bridgeport), and Wang (Hastings).

290. The other is Professor Hylton of Northwestern University.

291. Could this passage *possibly* be more self-serving?! For the second time, then, I must beg the reader's indulgence. I feel compelled to use myself as an example, however, because of the significant gap that exists between the pat, administrative "there are no qualified minorities" slogan, and the reality of my experience. In the words of one of the commentators on a draft of this Article, I have no reason to be apologetic, because "the facts are the facts." Accordingly, in wanton and malicious immodesty, pursuant to the convention of law review authorship, my credentials are displayed at the beginning of this Article for all to see.

(including Harvard University) have not given me the time of day.²⁹² Even worse, I have watched as colleagues with lesser credentials, fewer publications, and less teaching experience land coveted jobs at some of these institutions. That's right, you guessed it: they're white, I'm not. When I talk to Derrick Bell about these matters, he has an explanation for me: Racism.²⁹³ This I believe.²⁹⁴ "There are no qualified minorities?" Sure. Next month's installment payment is absolutely, positively my last payment on the Brooklyn Bridge I bought ten years ago.

Kennedy's blackness is neither a necessary nor sufficient condition for experiencing the detrimental deindividualization that is racism. If Kennedy seeks to write from the perspective of those who have experienced racism, he must exercise considerable effort to extricate himself from the mindset produced by a lifetime of exposure to the dominant cultural apparatus. If, however, Kennedy has personally experienced the kind of racism that many scholars of color write about, then four possibilities remain.

The first possibility is that racism, or the subculture of detrimental deindividualization, is not a strong subculture—it does not span many social relationships—in Kennedy's life. The second possibility is that Kennedy has experienced racism "in principle," but that experience has a different meaning for him, primarily because racism has been embedded within other subcultures (e.g., class). Kennedy, therefore, has not experienced the crass, naked racism that is not embedded in other subcultures. If Kennedy wishes to write from

292. I assume that the institutions to which I applied knew that I was black since I checked off the appropriate space in the AALS form I submitted with my resumé. Since there were a number of schools that did not even bother to respond to my inquiry, I am led to conclude that the "we can't find qualified minorities" argument is untrue.

Also, hopefully the reader will note that I have tried to avoid the debate over what does or does not constitute a "prestigious" law school. I think all of my colleagues would agree, however, as to which law schools have the highest faculty salaries, lowest teaching loads, most research support, etc.

293. Professor Bell (as is his exceptional nature) has given me some career advice over the past few years. For a more formal statement of his position on minority hiring at American law schools, see Derrick A. Bell, Jr., *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986). Bell took an unpaid leave of absence from Harvard Law School in 1990 to protest the school's failure to grant tenure to any minority women on the faculty. In 1992, he was dismissed from his position at the school for refusing to end his leave of absence. See *Harvard Law Notifies Bell of Dismissal for Absence*, N.Y. TIMES, July 1, 1992, at A19. Harvard Law School has not hired a minority woman for a tenure-track position on the law faculty to date. For more on the topic, see Stephanie B. Goldberg, *Who's Afraid of Derrick Bell? A Conversation on Harvard, Storytelling and the Meaning of Color*, 78 A.B.A. J., Sept. 1992, at 56 (interview with Professor Bell). Of course, by no stretch of the imagination should this footnote or the statement in the body of the text be read to imply that Professor Bell told me that I specifically was not considered at Harvard because of my race.

294. Pick a dimension, any dimension. Let us assume that the real way the world works is that one accesses the elite schools through de minimis (but high) qualifications *plus* the old boy (or girl) network. So why am I not part of the old boy network? I'm a pretty affable guy (no, really!). Answer: what it means to be in a racist world is that social relationships are racially driven. Therefore, despite my best efforts, the probability that I will be included is low. This is assuming that my otherwise comparable credentials have not been devalued by my minority status. I should note that a major and recent exception to this story of exclusion is represented by the efforts of Ken Dau-Schmidt, who has made every effort to include me in the law and economics old boy network (young: average age about 35). For a discussion of the old boy network from the perspective of a minority law professor, see Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986).

the perspective of those who experience racism on a more frequent or potent basis, my recommendation is the same as above: experience the perspective, vicariously or otherwise.

The third possibility is that Kennedy has experienced racism with frequency and potency, but refuses to characterize it as racism. I do not know Professor Kennedy well enough to make this judgment. Even and especially if I did, I would not render that judgment here. I am convinced, however, that there *are* minorities in high places who exhibit a denial mixed with raw self-hatred that is the focus of this third possibility. For me, this behavior is merely testament to the power of the cultural apparatus to engage in both beneficial (e.g., there is no racism by whites against blacks) and detrimental (e.g., blacks deserve all the bad things they get) deindividuation.

The fourth possibility is that Kennedy has personally experienced racism, but perhaps not with a high frequency or potency. Even if it has been with high frequency or potency, however, the point is that he is convinced that the method for combatting racism that is being pursued by critical race theorists is not optimal. I would like to believe that it is this fourth possibility that characterizes Kennedy's assessment of critical race theory. This fourth possibility also goes to the heart of debates among minorities of different ideological persuasions.²⁹⁵ Because of its broader ramifications, it is this possibility that I subject to economic analysis. Let me note, however, that I am convinced that many of these debates over the optimal method are debates over the frequency, potency, and denial of racism or acculturated self-hatred that masquerade in the guise of debates over method.

C. Application: Economic Analysis of Cultural Analysis of the Kennedy/Bell Debate

1. An Economic Model

There are many economic models one might employ to analyze the different dimensions of the Kennedy/Bell debate. For example, one could argue that the debate is really a lesson about the enormous cost of reshaping preferences²⁹⁶

295. For example, focusing on blacks, there are a number of names that traditionally crop up in discussing the black neo-conservative movement. See, e.g., THOMAS SOWELL, AFFIRMATIVE ACTION RECONSIDERED: WAS IT NECESSARY IN ACADEMIA? (1975); THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972); Shelby Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame*, HARPER'S, June 1988, at 45. It is useful to note here that Sowell's most recent book, *Race and Culture*, makes the case for the proposition that culture as well as race are determinative of a group's success in society. THOMAS SOWELL, RACE AND CULTURE (1994). In view of my discussion about my relative success and my experiences with racism, see, e.g., *supra* part II.E.1, and given the fact that I am a black immigrant, the reader should not be surprised to discover that I disagree with Sowell's thesis. I am of the belief that, in America at least, race, rather than culture, is far more determinative of success. It is heartening to see, however, that more and more scholars are beginning to discuss the difference between race and culture and the relative importance of those two variables. It is a short step from that discussion to a discussion of the proposition that race is an artificial and social construct.

296. For a discussion of the preference-shaping function of laws, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

that have been shaped by myths so powerful that they are considered "natural" (e.g., race). Kennedy and Bell, the story goes, have different assessments of the enormity of those costs. As another example, production theory might be invoked.²⁹⁷ Under that approach, Kennedy and Bell are implicit co-producers who are using a production process whose ultimate output is the obliteration of racism.²⁹⁸ Inefficient by-products—the intellectual and moral untidiness, and the counterproductive dimension of using racism to fight racism—have been tolerated for some time. The producers, however, now disagree as to the efficiency of tolerating the by-products any further.²⁹⁹

The preceding examples raise some interesting analytical and practical possibilities. Nevertheless, because of the strategic nature of the behavior of the parties in this context—Kennedy had the option of not publishing his article, and the supporters of Bell had the option of not conducting a colloquy—perhaps the most appropriate mode of economic analysis is game theory. Game theory has been extant in the economics literature for at least the past forty years.³⁰⁰ Only recently, however, have law and economics scholars chosen to use it to analyze problems in the law.³⁰¹ The following excursion is therefore quite consistent with the spirit of current law and economics research.

At least four steps³⁰² are involved in conducting a game theoretic analysis of a particular situation. One must (1) identify the players of the game;³⁰³ (2) identify the strategic options that the players face;³⁰⁴ (3) specify the

297. For good introductory discussions of the economics of production by the firm, see MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS 251-74 (1991). For a more advanced discussion, see RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1992).

298. For a discussion of the economics of production processes ("production functions"), see KATZ & ROSEN, *supra* note 297, at 257.

299. *See id.* at 640-57.

300. Game theory was originally introduced in JOHN VON NEUMANN & OSKAR MORGENTHAU, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944). For useful histories of game theory in economics, see the articles cited *infra* note 301, and Andrew Schotter & Gerhard Schwödiauer, *Economics and the Theory of Games: A Survey*, 18 J. ECON. LIT. 479 (1980).

301. One of the seminal pieces in this regard is Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990) (reviewing ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1989)). Since that time, the literature has blossomed considerably. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Sergiu Hart, *Shapley Value*, in THE NEW PALGRAVE: GAME THEORY 210 (John Eatwell et al. eds., 1989); Kenneth W. Abbott, "Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements, 26 CORNELL INT'L L.J. 1 (1993); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38 (1990). At least one American law school (NYU) offers an entire seminar on game theory and the law.

302. "The basic structure of game theory consists of specifying the number of players in a game (or the number of firms in an industry), the strategies available to each player, and the outcomes that accrue to each player once a particular choice of strategies has been made." WALTER NICHOLSON, INTERMEDIATE MICROECONOMICS AND ITS APPLICATION 387 (4th ed. 1985). Game theory can be quite mathematically complex. That complexity need not be entertained in this Article given the limited goals that I wish to achieve with game theory. For this reason, I have elected to pursue the minimum number of steps involved in game-theoretic analysis. For an example of the more complex steps involved, see Ayres, *supra* note 301, at 1295-1300.

303. Ayres, *supra* note 301, at 1295-96.

304. *Id.*

payoffs that results from pursuing particular strategic options;³⁰⁵ and (4) "solve" the game, which usually involves predicting the particular strategic option a party will choose.³⁰⁶ Superimposed upon these four steps are the various methods of classifying games. Perhaps the most popular method is to classify according to the relationship among the payoffs. A zero-sum game exists where the payoffs net to zero. That is, what player one wins is precisely equivalent to what player two loses (*e.g.*, conventional war, litigation). In a nonzero-sum game,³⁰⁷ the payoffs can sum to a negative number (*i.e.*, a negative sum game, like nuclear war) or to a positive number (*i.e.*, a positive sum game, like most forms of business competition).

Perhaps one of the most instructive and applicable forms of a nonzero-sum game is the "prisoner's dilemma."³⁰⁸ It will be useful to illustrate³⁰⁹ that game and then generalize on the basis of the illustration. Following the steps outlined above: the players in this game are you, the reader, and the other people in the crowd at the next cocktail party that you attend. The strategic options confronted by you and everyone else in the crowd are either to speak softly or to shout. The players, and the strategic options confronted by the players, can be arranged in a two-by-two matrix similar to Figure 2.

		Other Attendee's Action	
		Speak Softly	Shout
Individual's Action	Speak Softly	Cell 1 ----- Individual is heard clearly.	Cell 2 ----- Individual is drowned out entirely.
	Shout	Cell 3 ----- Individual is heard very easily.	Cell 4 ----- Individual is barely heard.

Figure 2

Four possible payoffs, corresponding to the four cells of the matrix, exist. Cell 1 is possible because you have entered into an ironclad agreement with the individuals in the crowd which requires that you will all speak softly. They comply: they all speak softly. You comply: you speak softly. The payoff is that you and the other individuals in the crowd can be heard clearly. Cell 4 is the opposite of Cell 1. Everyone breaches the agreement to speak softly. Everyone else shouts. You shout. The payoff is that you and the other individuals in the crowd can barely be heard. Cell 2 comes about because you

305. *Id.* at 1296.

306. *Id.*

307. See DONALD MCCLOSKEY, *THE APPLIED THEORY OF PRICE* 459-60 (1982).

308. For a good introduction to this game, see *id.* at 449-58.

309. For a discussion of the specific cocktail party illustration I use here, see *id.* at 454-55.

entered into the agreement to speak softly. The problem is that you comply and the rest of the crowd does not. The payoff is that you are drowned out entirely while the rest of the crowd can still hear one another to some extent. Cell 3 is the reverse of Cell 2 in the sense that this time, you renege while the crowd complies with the agreement. Since you are shouting while everyone else is speaking softly, the payoff to you is that you will be heard very easily.³¹⁰

The solution to this game is known to the reader from experience. That is, everyone at the cocktail party implicitly decides not to cooperate in the implicit agreement to speak softly. Everyone pursues their individual self-interest. The result is Cell 4, where each individual is barely heard.

It is now possible to generalize on the basis of this illustration. A prisoner's dilemma game is a nonzero-sum game with the following payoffs under the following circumstances. First, if the players cooperate, they will be led to the best possible collective outcome—an outcome that is also acceptable at the individual level—Cell 1. Second, if the players do not cooperate, they will be led to the worst possible collective outcome—and one that is the worst at the individual level as well—Cell 4. Third, an individual player can do best of all by reneging on the cooperative agreement at the same time that the other players abide by it—Cell 3.

At this level of generality, it may be useful to reflect on the nature of the broader problem suggested by the prisoner's dilemma. The dilemma deals with, and suggests, an ultimate outcome or solution to, the problem of competition in an oligopoly.³¹¹ Collusion is too costly a solution when there are many competitors,³¹² and it is unnecessary when there are no competitors, as in a monopoly. Collusion will be worthwhile to a few competitors, however, if the cost of enforcing the agreement to collude is reasonable relative to the benefits of collusion. When the few competitors organize based on an agreement, they are called a cartel. The incentive to organize is that they can each do better within the cartel—Cell 1—than if they compete with one another—Cell 4. The agreement must be enforced, however, since any given member has a massive incentive to welsh—either to do better—Cell 3—or to avoid being the last one to welsh—Cell 2. A cartel that reverts to competition is said to be unstable.³¹³ This is most likely to occur where the cost of enforcing the agreement is simply too high.³¹⁴

An agreement that successfully survives does so mainly because it succeeds in altering the payoffs that any given member faces (*e.g.*, Cells 2 or 4). Because the nature of the payoffs can vary greatly, so too can the nature of

310. *See id.* at 455.

311. *Id.* at 448-49.

312. At the limit, if there is an unlimited number of competitors ("perfect competition"), the cost of cooperation will be exorbitant because the competitors must assemble, work out an agreement, and then enforce it.

313. McCLOSKEY, *supra* note 307, at 457; *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 27 (1984) (commenting on the instability of cartels).

314. *See* McCLOSKEY, *supra* note 307, at 457.

the enforcement mechanisms (e.g., punishment,³¹⁵ shame,³¹⁶ etc.). The prisoner's dilemma model is a model of enormous analytical power. It can be used to shed light on everything from the behavior of the Federal Government as a cartel of the member states³¹⁷ to the behavior of players of tic-tac-toe.³¹⁸ The following section uses the model to shed some insight on the Kennedy/Bell debate.

2. Application to the Kennedy/Bell Debate

Different dimensions of the Kennedy/Bell debate can be captured in different games. In this section and that which follows, I discuss one such game fully, and other possible games more briefly. The first game discussed considers whether other minority scholars in the future will critique critical race theory, and predicts that there will be some who will.

The state of the world for this game is the world before Kennedy published his piece criticizing critical race theory. Therefore, the players in this game are Kennedy and other minority scholars in critical race theory. A plausible case can be made that Kennedy's writings before his critical piece were in the spirit of, or sympathetic to, the ideas posited by critical race theorists.³¹⁹ It is at the point of publishing his critical piece, therefore, that Kennedy and critical race theorists unambiguously parted company. At that point, the decision facing Kennedy was the same decision facing other minority scholars within critical race theory. That is, each individual has the option to publish or not publish views that are critical of critical race theory. Publishing is in the self-interest of the publisher to the extent that it allows him to express his own personal views. The matrix is captured in Figure 3.

Cell 1 represents the payoffs to Kennedy and those within critical race theory when everyone abides by the implicit agreement that no minority scholar will publish views critical of critical race theory. In this cell, the immediate payoff is that the point of view of the group³²⁰ is advanced by Kennedy and by the members of the group. The longer term payoffs are the psychic³²¹ and career benefits to everyone³²² from advancing this point of view. The opposing cell is Cell 4, in which everyone, including Kennedy, decides to be critical of critical race theory. The cost to the group is that its

315. *Id.* at 456.

316. *Id.* at 457.

317. *Id.* at 453.

318. *Id.* at 458.

319. In the Delgado & Stefancic critical race theory bibliography, cited *supra* at note 257, Kennedy has two entries. One is his Harvard article critical of critical race theory. Kennedy, *supra* note 255. The other is Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986), which discusses the oppressive racial order perpetuated by the Supreme Court and the role of "celebrants" in that perpetuation.

320. See *supra* text accompanying notes 260-61.

321. Examples include the sense of belonging to a community of scholars, of acting morally, and so forth.

322. To the extent that the scholars involved are publishing something distinctive, there are indeed career benefits to be obtained.

		Action of Other CRT Scholars	
		Refrain from Criticizing	Criticize
Individual Scholar's Action	Refrain from Criticizing	Cell 1 ----- Both voices are advanced.	Cell 2 ----- Individual's voice is repressed.
	Criticize	Cell 3 ----- Individual's voice is much advanced.	Cell 4 ----- Both voices are repressed.

Figure 3

point of view is lost in the babel,³²³ if indeed the group exists at all. Similarly, Kennedy's point of view swims in a sea of points of view from other minority scholars critical of critical race theory. It is barely distinguishable.

In Cell 2, Kennedy has entered into an implicit agreement with other minority scholars not to publish views critical of critical race theory. Kennedy abides by this agreement and continues to publish pieces sympathetic to critical race theory. This point of view is scarcely noticed, since everyone else has reneged on the implicit agreement and is publishing works critical of the critical race point of view. Finally, in Cell 3, it is Kennedy who reneges on the implicit agreement that minority scholars not publish views critical of critical race theory. His personal point of view stands out since everyone else is publishing works that are supportive of critical race theory. Cell 3 clearly has come to pass, with Kennedy choosing to renege.

There are several reasons, however, why one might suggest that the ultimate equilibrium of the intellectual cartel of critical race theory will be Cell 4. First, cartels encourage their members to select Cell 1 (cooperation) and not Cell 4 (reneging), by taking measures that alter the payoff in Cell 4. For example, the group might punish members who renege, or have effective methods of apprehending those who renege. Both methods would cause individual members to revise their expected payoff in Cell 4. In this regard, it could be argued that critical race theorists did not fare well. Not only did the group not succeed in punishing Kennedy for publishing his personal critical views, it may have inadvertently rewarded him (e.g., the publicity of the colloquy,³²⁴ etc.). Assuming that all other things are constant, new and old members of the group have now revised their payoff estimates upward and

323. Perhaps this is the "cacophony of voices" referred to by Espinoza. See Espinoza, *supra* note 273, at 1886.

324. The colloquy was a collection of articles in response to Randall Kennedy's critical article. See *supra* note 264. It included articles by Ball, *supra* note 271, Barnes, *supra* note 272, Brewer, *supra* note 264, Delgado, *supra* note 268, and Espinoza, *supra* note 273.

not downward, and are therefore more likely to renege on the implicit agreement that minority scholars not criticize critical race theory.

A second reason why Cell 4 might be the equilibrium or ultimate outcome for critical race theory is that, given the preceding cultural analysis, the incentive for any individual minority scholar to "cheat" may be just too great. True, minorities collectively face the problem of racism. But one powerful reason why racism is a problem for each of us is that it robs us of our uniqueness and individuality through the guise of the myth of race. Paradoxically, one possible response is to assert one's individuality to the detriment of the collective. I have argued in this Article that although a response to the paradox is warranted, this method is not the optimal response.³²⁵ Other minority scholars may not be persuaded by my argument.

Finally, Cell 4 may be the ultimate outcome of the critical race theory cartel simply because of the difficulty of identifying the termination point of the cartel. That is, a natural resources cartel terminates once the natural resource has been fully depleted by the cartel members.³²⁶ One might be tempted to argue that once racism is vanquished, there will be no need for critical race theory. However, unlike the natural resources depletion situation, there are counter-currents in the case of racism. Racism serves as a means to delineate cultural boundaries.³²⁷ Some, especially if they see blackness and African-Americanism as inextricably intertwined,³²⁸ may argue for the continued existence of racism as a means to preserve culture. As critical race theory becomes more successful and racism is abated, the termination of the cartel will not be as swift as might be expected. Instead, as the loosely organized cartel persists, one would expect to see a diversity of minority scholars offering a diversity of viewpoints, many of them critical of critical race theory.

The reasons suggested above may either not materialize or be corrected by critical race theorists, leading to a long existence in Cell 1 of the matrix shown in Figure 3. The social equivalent of the Heisenberg uncertainty principle—that measurement effort may cause movement, leading to ultimate unmeasurability³²⁹—may also come into play. Critical race theorists who read this Article may be motivated to make changes to ensure that my predictions will not come to pass. Such changes will allow critical race theory to continue to make valuable contributions to legal thought.

325. See my proposal of the proper response to the paradox in light of Kennedy's piece, *supra* at note 285.

326. There are other reasons a cartel such as OPEC might terminate, including its fundamental instability (e.g., inability to prevent cheating by members). For more advanced discussions of the stability of cartels, see Easterbrook, *supra* note 313.

327. For a discussion of the relationship between race and ethnicity, see *supra* text accompanying notes 90-100.

328. I have argued that the two are separable. See *supra* note 127 and accompanying text.

329. DAVID C. CASSIDY, UNCERTAINTY: THE LIFE AND SCIENCE OF WERNER HEISENBERG 226-46 (1991); see also ERNST CASSIRER, DETERMINISM AND INDETERMINISM IN MODERN PHYSICS (1956) (discussing various philosophical, physical, and metaphysical aspects of determinism and indeterminism); ALEXANDRE KOYRÉ, NEWTONIAN STUDIES 5 (1965) (noting that the issue of indeterminacy is a very powerful controversy).

At a minimum, the value of the preceding exercise has been to demonstrate how economic analysis can inform a legal or law-related problem that is situated within another culture or subculture. There remain other dimensions of the Kennedy/Bell debate that are amenable to game-theoretic analysis. For example, a possible game being played by those on each side of the Kennedy/Bell debate centers on whether to take a racist or non-racist posture in the fight against racism. As another example, a series of games arise when one characterizes the Kennedy/Bell debate as a disagreement over the question of who are the correct players in the game of racism (e.g., game 1: us or them, game 2: us or them or society, game 3: us or society). Unfortunately, because of space limitations, those remain games for another day.

IV. THE RELATIONSHIPS OF CCL&Ec

The purpose of this final Part is to show how CCL&Ec is related to certain other currents in the law. Subpart A discusses how the two branches of CCL&Ec are related to one another. Subpart B explores how CCL&Ec is related to certain discrete jurisprudential movements in the law. Finally, Subpart C discusses the practical implementation of CCL&Ec, couched within a discussion of the amorphous and very recent movement of pragmatism in jurisprudential thought.

A. The Relationship of CCL&Ec-C to CCL&Ec-L

In the case of CCL&Ec-C, it is culture that informs law and economics analysis—for example, the law and economics of discrimination analyzed from another cultural perspective. In CCL&Ec-L, it is law and economics analysis that informs culture—for example, using the game theory to analyze the Kennedy/Bell debate in critical race theory. These two branches of CCL&Ec—CCL&Ec-C and CCL&Ec-L—are reflected on the right- and left-hand sides respectively, of Figure 4.

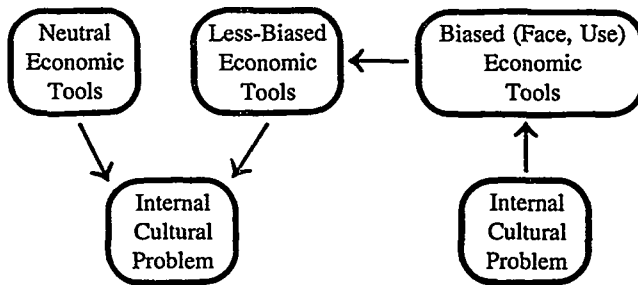


Figure 4

Figure 4 makes it clear how the two branches of CCL&Ec are related to one another. In the case of CCL&Ec-C, the discussion of the legal dimensions of an internal cultural problem from a different cultural perspective demonstrates the biased nature of economic tools or analyses. The economic tools or analyses may be biased on their face or in their application. To be sure, there are many consequences of pointing out the biased nature of the economic tools or economic analyses. One consequence is that these now less-biased tools or analyses will be available for use in dealing with some other internal cultural problem.³³⁰ This connection is reflected in the arrow pointing from the right- to the left-hand side of Figure 4. Note that CCL&Ec-L, the left-hand side of Figure 4, also involves bringing neutral economic tools or analyses to bear upon the legal dimensions of internal cultural problems.

Figure 4 demonstrates that CCL&Ec does not exist to supplant or otherwise occupy the space that law and economics fills. Clearly, problems exist that are cross-cultural in nature (e.g., providing minimum health care for a population). Law and economics continues to have vitality in providing the broad intellectual structures within which the economic analysis of law will be conducted. In the limited instances where law and economic scholars are crossing boundaries into cultures not fully their own, however, it is conceivable that CCL&Ec will enjoy some applicability.

B. The Relationship Between CCL&Ec & Other Movements

1. CCL&Ec & Critical Race Theory

By this point, it should be clear that there are significant areas of overlap between CCL&Ec and critical race theory. For example, both frameworks

330. There is no reason why the legal dimensions of the internal cultural problems on the left- and right-hand side of Figure 4 should necessarily be different problems. It is unlikely, however, that they will be the same problem.

place emphasis on the points of view of legal scholars of color.³³¹ Indeed, at least one example can be found of a critical race theory scholar who conducts a law and economic analysis of a law-related problem from her cultural point of view.³³² CCL&Ec emphasizes that individuals other than scholars of color are capable of learning and appreciating perspectives often attributed to scholars of color. It remains unclear whether critical race theory subscribes to the latter view.³³³ Both frameworks emphasize the importance of telling stories—immersion into the database of life experience—as an analytical method.³³⁴

At least two important differences are worth noting. First, there is much in a name. In this Article, I have made much of my radical theory of non-race—the proposition that the mythical construct of race is itself racist since its very existence makes inevitable the association of psychological characteristics with physically apparent and immutable ones.³³⁵ It is possible, and even desirable from my point of view, to discuss the experience of deindividuation while not reinforcing the idea of race, which is one reason why the word “culture” and not “race” is the word employed to characterize the framework proposed in this Article. Another reason is that culture spans experiences that have nothing to do with “race” (e.g., gender). By highlighting this difference between the two frameworks, readers should not interpret my comments as denigrating the considerable successes of critical race theory.

A second major difference between the two frameworks is the role that cultural analysis and law and economics play in CCL&Ec. One of the objectives of this Article is to provide a framework that expands the power of law and economic analysis. It is in this sense that the methodology and substantive emphases of critical race theory are far broader than those of CCL&Ec.

2. CCL&Ec & Critical Legal Studies

Critical legal studies can be characterized as a movement which involves directing certain critiques (e.g., “indeterminacy,” “entrenchment,” etc.) at certain legal objects (e.g., legal rules, the legal academy, etc.).³³⁶ From the standpoint of methodology, methodological eclecticism appears to be the order of the day in critical legal studies.³³⁷ If these characterizations are correct,

331. See, e.g., Delgado & Stefancic, *supra* note 257. In assessing the themes of critical race theory, Delgado and Stefancic state: “Many Critical Race theorists consider that a principal obstacle to racial reform is majoritarian mindset.” *Id.* at 462. Also, although not all scholars of color have experienced discrimination, several have and can therefore write from this perspective.

332. See Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631 (1992) (conducting a cost/benefit analysis of affirmative action and concluding that the benefits outweigh the costs).

333. See *supra* text accompanying note 261.

334. See Delgado & Stefancic, *supra* note 257, at 462. For a discussion of the methodology of cultural anthropology, see *supra* notes 141-56 and accompanying text.

335. See *supra* note 110 and accompanying text.

336. Audain, *supra* note 1, at 1034-35.

337. *Id.* at 1037.

then it is conceivable that there might be some common ground between CCL&Ec and critical legal studies. For example, both frameworks critique the veneer of objectivity of law and economic analysis.³³⁸

There are, however, some important differences between the two frameworks. First, a critical legal studies scholar might seek to show not only that there is a veneer of objectivity to law and economic analysis, but that the veneer conceals power differences, perpetuates the interests of the powerful, and so on.³³⁹ At times, the critical legal studies analysis will prove to be correct, and therefore such analysis has its place. The objective of CCL&Ec is not as ambitious. CCL&Ec would show the limits of objectivity to the extent that a different cultural perspective would lead to a different analytical outcome.³⁴⁰

Second, there are strains in critical legal studies that hold that *all* of law and economic analysis lacks objectivity. Indeed, these strains can be and have been characterized as being antipositivistic.³⁴¹ Once again I emphasize my belief that these strains have a valuable role to play in the legal academy.³⁴² Note, however, that these antipositivistic strains of critical legal studies part company with CCL&Ec to the extent that CCL&Ec holds that the difficulty is not with *all* of law and economics. CCL&Ec maintains that the analytical difficulty arises especially when an analyst crosses cultural boundaries or is unaware of the cultural bias of the economic tool or analysis being utilized. The objective of CCL&Ec is to temper or be tempered by positivism, not to eliminate it. Stated differently, the "Critical" in CCL&Ec is a reference to the word "critical" as used by Kant, the father of critical theory, to expose the structures and capacities of reason.³⁴³ It is not the meaning of the word

338. In my CCL&Ec critique of the law and economics of discrimination, for example, I make much of the argument that the cultural perspective of Posner and Epstein biases the law and economic analysis that they conduct. See *supra* text accompanying part II.E. Along similar lines, critical legal studies scholars have criticized law and economics. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (restating the critical legal studies critique of law and economics, focusing on the fallacy and emptiness of right-wing libertarian theory); Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7 (1991); see also Mark Hager, *Against Liberal Ideology*, 37 AM. U. L. REV. 1051 (1988) (reviewing KELMAN, *supra*).

339. See, e.g., sources cited *supra* note 338.

340. Of course, one could incorporate power into the analysis by showing that a given cultural perspective serves to perpetuate the holding of power by a certain group.

341. See Standen, *supra* note 130, at 983.

342. Throughout a previous article, I note that there can be full reciprocal dialogue between and among the various jurisprudential movements (i.e., critical legal studies, law and economics, feminist jurisprudence, and mainstream thought) if and only if the various movements maintain their structural integrity. Audain, *supra* note 1, at 1019 n.3, 1058. I am a champion of the usefulness and continued existence of critical legal studies. Stated differently, it is very consistent with the positivistic idea of fallibilism to suggest that the existence of critical legal studies is necessary to point out the fallacies of positivism. For a definition of fallibilism, see *supra* note 130.

343. For a discussion of Kant's work, *A Critique of Pure Reason*, in establishing a critical theory, see MELCHERT, *supra* note 130, at 367-70. Indeed, a strong case can be made for the proposition that what I am attempting to do with CCL&Ec is very consistent with some dimensions of the neo-Kantian movement that prevailed in Germany from 1870 to 1920. This movement laid the foundation for the modern versions of sociology and the anthropological theories discussed *supra* at note 16. Compare for example, my critique of the law and economics of discrimination with the proposition that "[k]nowledge of history and of culture, of what [Wilhelm] Dilthey [one of the central actors in the movement] referred

"critical" as subsequently reformulated by the Frankfurt school, and adopted by critical legal studies, that fact and value are *always* inseparable.³⁴⁴

A final difference is that CCL&Ec uses law and economics and cultural analysis as its analytical backdrop. The mission of critical legal studies appears to be that of providing a perpetual critique.³⁴⁵ Few critical legal studies scholars have spent time dealing with the question of what it is that will replace the legal objects critiqued by critical legal studies.³⁴⁶ This issue does not arise in CCL&Ec, since it does not seek to replace cultural and law and economics analysis.

3. CCL&Ec & Feminist Jurisprudence

Feminist jurisprudence has been defined as "'an examination of the relationship between law and society from the point of view of all women.'" ³⁴⁷ Hopefully, CCL&Ec will create a space within which the practitioners of feminist jurisprudence can critique certain aspects of law and economics. For example, it could be argued that some aspects of family law reinforce detrimental deindividualization (e.g., oppression) of women through, among other things, the lax enforcement of child support judgments. It is therefore conceivable that the economic analysis of family law³⁴⁸ might also implicitly reinforce this oppression. This could be uncovered through a critique of law and economics based on feminist jurisprudence.

Of course, it is also conceivable that law and economics might serve to inform some aspects of feminist jurisprudence. For example, the paradox of deindividualization may be something that manifests itself in feminist thought.³⁴⁹ If this is true, then the economic analysis of critical race theory³⁵⁰ may yield insights for feminist jurisprudence as well.

to as the 'objectifications' of the human mind, could be derived, he argued, through some form of internal process—through lived experience and through understanding." MORRIS, *supra* note 130, at 149. See generally *id.* at 143-52, for a discussion of neo-Kantian perspectives.

344. See Standen, *supra* note 130, at 994.

345. See Audain, *supra* note 1, at nn.57-58.

346. One possible reason for this is that critical legal studies, like the Frankfurt school of critical theory it represents, has been "rendered speechless by their own philosophy." Standen, *supra* note 130, at 994. It should be noted, however, that division in the ranks of critical legal studies turns on the twin questions: (1) whether critical legal studies should be offering a replacement for that which it critiques, and (2) what should be the nature of that replacement. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 620 nn.99, 101, 103 (1989).

347. Christine A. Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 3 (1987) (quoting Catharine A. MacKinnon, Panel Discussion on Developing Feminist Jurisprudence, at the 14th National Conference on Women and Law, Washington, D.C. (Apr. 9, 1983)).

348. For a good summary of the current state of this body of work, see POSNER, *supra* note 1, at 139-61.

349. See *supra* text accompanying notes 117-19.

350. See *supra* part III.C.2.

4. CCL&Ec & Non-Chicago Law & Economics

I would be remiss if I were to leave the reader with the impression that law and economics, as it is applied today, is without its nascent internal critiques or variants. For example, some members of the "reformist"³⁵¹ or "Post-Chicago"³⁵² school of law and economics seek to challenge the conservative ideological hegemony of the free market analysis espoused by the Chicago school of law and economics (or the Virginia school of public choice economics,³⁵³ its close cousin).³⁵⁴ As another example, the nascent institutionalist school of law and economics reflects the influence of institutionalism in economics.³⁵⁵ Institutionalism, which stresses the functional importance of institutions (e.g., marriage) to a culture, is a movement in anthropology that had its beginnings in the early part of this century.³⁵⁶ Perhaps its most vocal proponent in economics was Thorstein Veblen.³⁵⁷ The tradition of Institutionalism is one that became based in, and continues to this day at, the University of Wisconsin Economics Department.³⁵⁸

There are important differences and similarities here. Consider first the nascent internal critiques of law and economics. An significant difference is that these important critiques are first and foremost *ideological* critiques. The dictionary definition of ideology is "the ideas or manner of thinking characteristic of an individual or group."³⁵⁹ Yet, if culture is concerned with the *meaning* of ideas, it is clear that culture subsumes ideology. Stated differently, CCL&Ec has no particular ideological agenda in the traditional sense (e.g., conservative or liberal). It does, however, have an ideological agenda in being committed to the idea that culture, at times, does matter to law and economic analysis.

351. See, e.g., Susan Rose-Ackerman, *Law & Economics: Paradigm, Politics or Philosophy*, in *LAW AND ECONOMICS* 233, 244-47 (Nicholas Mercuro ed., 1989).

352. See Symposium, *Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 3 (1989); Symposium, *Non-Posnerian Law and Economics*, 12 HAMLINE L. REV. 197 (1989).

353. See DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989); *THE THEORY OF PUBLIC CHOICE-II* (James M. Buchanan & Robert D. Tollison eds., 1984); see also Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991).

354. The argument here is that the Chicago and Virginia schools are, in effect, different sides of the same ideological coin. The Chicago school celebrates free markets, while the Virginia school demonstrates the inability of government to effectively represent public choice.

355. See Nicholas Mercuro, *Toward a Comparative Institutional Approach to the Study of Law and Economics*, in *LAW AND ECONOMICS*, *supra* note 351, at 1.

356. Institutionalism is essentially functionalism, discussed *supra* at note 18.

357. See DAVID SECKLER, *THORSTEIN VEBLEN AND THE INSTITUTIONALISTS: A STUDY IN THE SOCIAL PHILOSOPHY OF ECONOMICS* (1975); THORSTEIN VEBLEN: *A CRITICAL REAPPRAISAL* (Douglas F. Dowd ed., 1958); Jeff E. Biddle & Warren J. Samuels, *Thorstein Veblen on War, Peace, and National Security*, in *ECONOMICS AND NATIONAL SECURITY: A HISTORY OF THEIR INTERACTION* 87 (Crawford D. Goodwin ed., 1991).

358. See generally AN INSTITUTIONALIST GUIDE TO ECONOMICS AND PUBLIC POLICY (Marc R. Tool ed., 1984); WILLIAM M. DUGGER, *UNDERGROUND ECONOMICS: A DECADE OF INSTITUTIONALIST DISSENT* (1992) (discussing institutionalism and its relation to neoclassical economics); SECKLER, *supra* note 357.

359. FUNK & WAGNALL, *STANDARD COLLEGE DICTIONARY* 665 (1977).

An example will suffice. One of the foundations of Burkean (conservative) ideology is that ideas that have withstood the test of time are more trustworthy than ideas of more recent origin.³⁶⁰ It is conceivable that I might agree with this proposition as exemplified in several domains (e.g., government monetary and fiscal conservatism).³⁶¹ Yet, my membership in the culture of detrimental deindividuation causes me to flatly reject the validity of Burkean ideology when it is applied to the racial status quo of a cultural apparatus that is very often antagonistic to people and things non-white. My cultural experience has influenced what the idea of conservatism means to me. That experience would motivate me to critique some parts of (conservative) law and economic analysis while accepting others.

Another important difference between CCL&Ec and the internal critiques of law and economics is that the second branch of CCL&Ec, CCL&Ec-L, is in effect a reverse critique of the Chicago school of law and economics. As a critique of culture through the tools of law and economics, it seeks to expand the possibilities for application of the traditional Chicago school of law and economics. This second branch is not present in internal critiques of law and economics.

Of course, there are similarities between CCL&Ec and the current internal critiques of law and economics. As a general matter, those ideological critiques that may be driven by or reflect a different cultural perspective are completely consistent with CCL&Ec.³⁶²

Consider also the nascent institutional law and economics. Both CCL&Ec and the institutional school conduct a cultural critique of law and economics. An important difference is that the institutional school seems to be committed to one of many possible theories of culture (i.e., functionalism), while CCL&Ec is amenable to all manner of cultural analyses.³⁶³ Also, the second branch of CCL&Ec discussed above—CCL&Ec-L—is not present in the institutional school.

360. See CHARLES W. DUNN & J. DAVID WOODARD, *AMERICAN CONSERVATISM FROM BURKE TO BUSH: AN INTRODUCTION* (1991); PETER J. STANLIS, *EDMUND BURKE: THE ENLIGHTENMENT AND REVOLUTION* (1991).

361. The idea that government need not balance its budget but could "deficit spend" was, in the history of economic thought, a very radical idea (that has obviously caught on!). This radical idea was partly the basis for an intellectual revolution in economic thought in the early part of this century that has been termed the "Keynesian Revolution," after John Maynard Keynes, the economist responsible for the radical idea. For a discussion of the Keynesian revolution, see generally BRIAN J. MCCORMICK, *HAYEK AND THE KEYNESIAN AVALANCHE* (1992). But see generally DISSENT ON KEYNES: A CRITICAL APPRAISAL OF KEYNESIAN ECONOMICS (Mark Skousen ed., 1992).

362. Unfortunately, it is too early, and the internal critiques of law and economics are too few, to identify the cultures that motivate internal critiques. It is possible, however, to note that much of the reform critique of law and economics is consistent with some aspects of CCL&Ec. For example, the CCL&Ec posture that I have taken—that the market will not cure discrimination—is consistent with a general reform critique of the Chicago school's posture that the market can solve almost anything. See *supra* part II.E.

363. The various possible theories of culture are discussed *supra* at note 18.

C. The Relationship of CCL&Ec to Pragmatism & Postmodernism

Although it is not easily subject to definition, postmodernism is represented primarily by a diminished reliance upon grand narratives (e.g., "the march of progress").³⁶⁴ Postmodernism has made its presence felt in several intellectual disciplines, including law.³⁶⁵ I am convinced that the current influence of Pragmatism,³⁶⁶ at least in law,³⁶⁷ is in part a consequence of postmodernity. That is, with the death of the grand stories about what should work, we are left with mainly one grand story: We will use what does work—for now.³⁶⁸

When one considers the broader agenda of proposing a framework for CCL&Ec,³⁶⁹ it becomes obvious that the intellectual confluence of that agenda with postmodernism is ambiguous. That is, CCL&Ec seeks to debunk the grand story that law and economic analysis is devoid of cultural influence at all times.³⁷⁰ It leaves intact, however, the grand story that law and economic analysis reflects foundational aspects of human nature that will be true across cultures and across time—for example, by and large, individuals take actions that are in their self-interest.

CCL&Ec's confluence with pragmatism is unambiguous, however. Indeed, CCL&Ec's ambiguity with respect to postmodernism is the price that it must pay for its unambiguous commitment to pragmatism. It seems eminently pragmatic to suggest that we should always and everywhere seek out balance in human endeavors. Indeed, our inclination as a species to vacillate between

364. "In American culture, grand narratives seem to have faltered more noticeably than elsewhere, not least as a result of the apocalyptic events of the 1930s." DOUGLAS TALLACK, *TWENTIETH-CENTURY AMERICA: THE INTELLECTUAL AND CULTURAL CONTEXT* 325 (1991). See generally MODERNIST ANTHROPOLOGY (Marc Manganaro ed., 1990) (examining views on the influence of modernism and postmodernism on the methods and views of anthropology); THEORIES OF MODERNITY AND POSTMODERNITY (Bryan S. Turner ed., 1990) (examining the past and future impact of modernity and postmodernity, in general).

365. See J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992); Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751 (1992); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992). For observations on some problems inherent in Balkin's definitional approach, see Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515 (1992).

366. Pragmatism is a uniquely American philosophy developed in the early part of this century by Charles Pierce, John Dewey, and William James. The very simple tenet of this philosophical school of thought is that philosophers should not be concerned with "meaningless gibberish," MELCHERT, *supra* note 130, at 473, but rather with philosophy and morality that work. See generally *id.* at 461-87.

There has been a renewal of pragmatism in other disciplines. See generally ERNEST E. BAYLES, *PRAGMATISM IN EDUCATION* (1966); EMILE DURKHEIM, *PRAGMATISM AND SOCIOLOGY* (John B. Alcock ed. & J.C. Whitehouse trans., 1983); *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds., 1991).

367. This is a very recent phenomenon. See, e.g., Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

368. One scholar who seems to agree with this conclusion is the philosopher, Richard Rorty. See TALLACK, *supra* note 364, at 326.

369. See the discussion of the embedded agendas of this Article *supra* at text following note 15.

370. This assumption reflects the influence of the classical logical positivist model discussed above. See *supra* note 130. Also, note that acceptance of the entire model is inconsistent with a realist philosophy of the social sciences.

states of imbalance,³⁷¹ as opposed to pursuing a perpetual state of balance, is fascinating. So it is that postmodernism in its most extreme variant seems to be imbalanced. Although it is a blessed insight of postmodernism that not all grand stories are worth keeping, we need not debunk all grand stories—some are actually worth keeping.³⁷² The trick now is to separate the wheat from the chaff; CCL&Ec represents one attempt to accomplish this task.

Another one of this Article's agendas, advancing the cause of non-racism, is unambiguously confluent with postmodernism and pragmatism. In the spirit of postmodernity, this Article has advanced a radical theory of non-race.³⁷³ This theory is an attempt to debunk not just the myth or grand story of the "natural" existence of different races, but also the grand story that race is possible. This position is staked out not just in the interests of truth, but also as a pragmatic idea. As long as we conceive of the possibility of race, that it is natural and proper to segment humans according to their apparent and immutable physical characteristics, then racism will remain with us. As long as we believe race is possible, there will continually be a new racial segmentation to replace some older one. Bell's notion of racial realism—racism will always be with us³⁷⁴—is valid only if one accepts his implicit assumption about the naturalness of race and our inability to free ourselves from the shackles of this construct.

In the immortal words of the great pragmatist, Jerome Culp: "How do we get there from here?"³⁷⁵ Throughout this Article, ways in which we might advance toward a non-racist society have been suggested. They are summarized here.

First, we can get there from here through open and frequent society-wide dialogue about the difference between traditional culture, race, and the culture of deindividuation. That these three constructs should be used interchangeably by many in our society suggests that the distinctions among them are unclear. For example, what it means to be black in America is that the likelihood is high that one has experienced racism. That is it. Since that experience is a statistical event, there are blacks in America who have not experienced racism with frequency or intensity—they are not members of the culture of detrimental deindividuation. What it means to be African-

371. I offer here no improvement on Hegel's notion of the dialectic. Hegelians (not Hegel) have used the terms thesis, antithesis, and synthesis to refer to this vacillation of imbalance. See MELCHERT, *supra* note 130, at 404, 408.

372. See Barry Smart, *Modernity, Postmodernity and the Present*, in THEORIES OF MODERNITY AND POSTMODERNITY, *supra* note 364, at 14.

373. See *supra* note 110 and accompanying text.

374. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). For responses by several commentators agreeing with some of Bell's premises but challenging his pessimism, see Willie Abrams, *A Reply to Derrick Bell's Racial Realism*, 24 CONN. L. REV. 517 (1992); Richard Delgado, *Derrick Bell's Racial Realism: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527 (1992); Linda S. Greene, *Civil Rights at the Millennium: A Response to Bell's Call for Racial Realism*, 24 CONN. L. REV. 499 (1992); and John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992).

375. This was Culp's comment to me following the presentation of this paper at the May, 1993, Law and Society Annual Meeting in Chicago, Illinois.

American is that one is a member and partakes of some or all of the traditional indicia (e.g., song, language) of a traditional subculture. The twist here is that experiences within the culture of detrimental deindividuation (i.e., racism) have formed the basis for some but not all of the indicia of African-American culture. Clearly, one need not be black or have experienced racism to be a member of African-American culture.³⁷⁶

This dialogue might occur as a discussion about the way the law conflates traditional culture, race, and the culture of deindividuation. That is conceivably a subject for another article or possibly even a book. Suffice it to say that legal opinions³⁷⁷ and statutes³⁷⁸ consistently conflate these three constructs. I would assume that the conflation in that domain reinforces the conflation in the minds of many.

Second, we at various levels of our society (e.g., in the classroom or the boardroom) need to imagine often the immense practicality of a world without race.³⁷⁹ One way to achieve this is to conduct the experiment of thinking

376. More clearly, the distinction is that ethnicity is largely based on cultural rather than strictly racial differences between groups—conceptions of “race” stem from perceived differences in appearance that are often culturally derived. JOE R. FEAGIN, *RACIAL AND ETHNIC RELATIONS* 9 (1978), cited in BRIAN J. GODFREY, *NEIGHBORHOODS IN TRANSITION* 31 (1988).

377. See, e.g., *Westfield v. Illinois Dep’t of Labor*, No. 90-3335, 1992 U.S. App. LEXIS 5777, at *6 (7th Cir. Apr. 1, 1992) (“While there was some underutilization of blacks downstate, only one minority office manager in the central region (not African-American), and only two black office managers of 36 downstate, defendant urged that the concentration of African-American office managers meant that technically it could not be said that there were no or few minority group members in the classification . . .”) (emphases added); *United States v. Johnson*, 941 F.2d 1102, 1104 (10th Cir. 1991) (“[T]he Government excluded potential jurors who, like Defendant, are African-American (‘black’).”) (emphases added); *United States v. Alston*, 895 F.2d 1362, 1373 (11th Cir. 1990) (Hatchett, J., concurring) (noting that the prosecution must articulate “a neutral explanation for challenging *Afro-American* (black) jurors”) (emphases added); *Hobbs v. Pennell*, 754 F. Supp. 1040, 1042 (D. Del. 1991) (“Among the Nation of Islam’s tenets are the belief that a separate nation must be created for *African-Americans*, because blacks and whites cannot co-exist . . .”) (emphases added); *Murray v. National Broadcasting Co.*, 671 F. Supp. 236, 241 (S.D.N.Y. 1987) (discussing the testimony of an expert witness who had studied “the portrayal and treatment of *Afro-Americans* (or *Black Americans*).”) (emphases added) (quoting the plaintiff’s affidavit), cert. denied, 488 U.S. 955 (1988).

378. See, e.g., 5 U.S.C. § 5703 (1988) (establishing “National *Afro-American* (Black) History Month”); 1991 IOWA ACTS § 7 (substituting “*African-Americans*” for “blacks” in IOWA CODE ANN. § 216A.1 (West 1993)); N.Y. CORRECTION LAW § 29 1(d) (McKinney 1993) (stating that “[S]tatistical information shall contain, but not be limited to, the following ethnic categories: (i) Caucasian; (ii) Asian; (iii) American Indian; (iv) *Afro-American/Black*”) (emphasis added).

379. As one example, consider the remarkable efficiency gains that would result if the police received an actual literal description of a “black” suspect. Because the suspect might be a male with literally black skin, hazel eyes, and tightly curled brown hair, the police would not have to stop me and nine other “black” males on the street. This would save 10 people from the remarkably unpleasant experience (trust me, it is unpleasant) of being a suspect in a crime, or worse, being incarcerated in a case of “mistaken identity.” Because the police would not have to stop 10 people wrongly while the suspect escaped, the probability that they would apprehend the real suspect would increase enormously. This state of the world would come about once we learned to look at individuals as such, with different skin tones, eye colors, temperaments, etc., and not just as “black” or “white” or “yellow.” For a discussion of the evidence that misidentification increases sharply when the perpetrator is a person of color and the victim or witness is not, see Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984). For arguments against the proposition that the race of the assailant should be a consideration in evaluating self-defense claims, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

about how an alien visiting our planet would view our racial situation. The alien would try very hard, but would fail to understand why we were so adamant about the naturalness and necessity of using skin color (*i.e.*, and not earlobe size) as the basis of categorizing ourselves. The alien would think it silly. Given the arbitrariness and unreliability of any system of categorization, not to mention the remarkable malleability of human nature, the alien would then wonder about this obsession we have with physically categorizing ourselves. The alien would be especially perplexed about this obsession once it discovered the net destructive effect that this categorization has on the well-being of our species. One level at which this thought experiment might be conducted is in the law school classroom, particularly in courses that deal with matters of race and culture.

Third, participants in race-based organizations should admit to the paradox we confront and make every effort to ameliorate it. It is impractical to suggest that we jettison these organizations or their important missions while racism still thrives. There are things that we can do, such as including and indeed soliciting the presence within our membership of those who do not look like us. We can also stop treating one another with the presumption that we all are, or should be, alike.³⁸⁰

Finally, at the most personal level, we can all start approaching one another as individuals, actively seeking out the quirks that make us each unique and the commonalities that make us all similar. One way to accomplish this is to approach each individual with a sense of wonderment, a sense of probable culture (as most of us approach a small child who is alone), always holding open the possibility that our expected culture will not be the individual's actual culture. I see no difficulty with treating the individual as a member of a given culture once the individual has identified himself or herself as such. The key, I suppose, is in accepting individuals for whom they have chosen to be culturally, as opposed to accepting them for choosing the culture we think they should have chosen or rejecting them because they have not chosen the culture we think they should have chosen. The latter is deindividualization, pure and simple.

CONCLUSION

In this Article, I have defined critical cultural law and economics to be the manner in which law and economics informs, and is informed by, culture. In one branch of CCL&Ec, it is culture that informs law and economics. In another branch, it is law and economics that informs culture. The explication of the dimensions of CCL&Ec has necessitated an intellectual detour into the nature of culture. Along this detour, a culture of deindividualization was

380. For a sample of some of the difficulties within the African-American community in this regard, see Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

defined as the attribution of psychological characteristics on the basis of apparent and immutable physical characteristics, which, as an act we all participate in, rises to the level of a culture with all the concomitant ramifications. In this Article, I have also defined a radical theory of non-race, which states that not only racial divisions but the very idea of race itself is racist since the idea makes racial classification, and therefore psychological attribution, inevitable. This creates a paradox because those of us who have been classified as racial minorities must often rely on that classification to resist those who would so classify us.

Analyzing the law and economics of discrimination using the methodology of cultural anthropology shows that there are propositions within the former that are problematic from the perspective of one who has experienced discrimination. This is an example of culture informing law and economics. Using cultural analysis and the economics of game theory, predictions about the impact of Randall Kennedy's work on the future of critical race theory became possible.

Hope, of course, springs deliriously eternal. It does so especially because of our incredible capacity as a species to throw caution to what seems teleological and to reinvent ourselves with each generation if need be. It is in the spirit and the promise of this hope for better things that I have defined critical cultural law and economics. I remain confident that my efforts will, in some season, prove fruitful.